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REFERENCE BOOK

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January 6, 1970

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Mr. Arthur F. McIntyre  
260 Golden Gate Avenue, Room 314  
San Francisco, California 94102

Re: Residence Requirements for Candidates  
for Election to Retirement Board

Dear Mr. McIntyre:

This is in response to your inquiry as to whether an employee member of the San Francisco City and County Employees' Retirement System may be a candidate for election to the Retirement Board if he is not a resident of the City and County of San Francisco.

Under Section 150 of the Charter the Retirement System is to be managed by a retirement board which is to "consist of the president of the board of supervisors, three members to be appointed by the mayor, and three members elected from active members, who shall not include retired persons of the retirement system."

In the absence of any specific language in Section 150 pertaining to residence requirements for members of the Retirement Board, Section 7 of the Charter would be applicable. That section provides:

"No person shall be a candidate for any elective office, nor shall be appointed as a member of any board or commission unless he shall have been a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office, unless otherwise specifically provided in this charter, and every elected officer and member of any board or commission shall continue to be a resident of the city and county during incumbency of office, and upon ceasing to be such resident, shall be removed from office."  
(Emphasis added.)



Mr. Arthur F. McIntyre

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January 6, 1970

"Except for those offices and positions and officers and employees specifically provided for in this section and other sections of the charter, the residential qualifications and requirements for all officers and employees and all offices and positions in the city and county service shall be as provided by ordinance of the board of supervisors."

Pursuant to the last paragraph, supra, the Board of Supervisors has enacted Section 16.99 of the San Francisco Administrative Code which permits officers and employees of the City and County to reside within 30 airline miles of City Hall during the incumbency of their office or employment.

Section 7 requires a candidate for any elective office to have been a resident of the City and County for a period of at least five years prior to his taking office and to remain a resident during his incumbency. Since an employee member acquires his position on the Retirement Board by direct choice of all active members of the Retirement System he can be said to be an elective officer. (See Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 183.) But is such elective officer intended by Section 7 to be included within its terms? In my opinion the answer is in the negative.

In the original enactment of the Charter, the first paragraph of Section 7 sets forth the residence requirements of elective officers. At the same time Section 150, in establishing the Retirement System, expressly excluded elective officers from membership therein. Thus, the conclusion is inescapable that the first paragraph of Section 7 in its use of the term "elective officer" did not intend to encompass an employee member of the Retirement System who might be elected to the Retirement Board inasmuch as elective officers were excluded from the class from which the employee member of the Retirement Board was to be selected. "Elective officer" must have the same meaning in both sections.

It is presumed that a word or clause in the Charter has the same meaning throughout. (See Carey v. Knight, 150 Cal. App. 2d 671, 680; Burton E. Green Inv. Co. v. McColgan, 50 Cal. App. 2d 224, 233; McCarthy v. Board of Fire Commrs., 37 Cal. App. 495, 498.) The fact that by charter amendments in 1947 and 1953 elective officers were brought into the Retirement System (see Sections 150.1 and 153.2) does not change the meaning of the term as used in Section 7.





Mr. Arthur F. McIntyre

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January 6, 1970

Moreover, the elective officers of the City and County are enumerated in Section 5, which states that they are elected by the voters of the City and County. Said section does not list members of the Retirement Board.

You are advised, therefore, that an employee member of the Retirement Board need not be a resident of the City and County of San Francisco. However, said person would be subject to the provisions of Section 16.99 of the San Francisco Administrative Code enacted pursuant to the authority of the second paragraph of Section 7 of the Charter by virtue of his appointment or employment.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
FEB 25 PM 4.43  
CLINTON VI  
ASSISTANT

January 9, 1970

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Civil Service Commission  
City and County of San Francisco  
151 City Hall  
San Francisco, California 94102

Attention of Mr. Harry Albert,  
Assistant General Manager, Personnel

Subject: Qualification of 9210 Airport  
Policeman for Probationary Appoint-  
ment - Necessity for Deputization  
by the Sheriff of San Mateo County

Gentlemen:

By your letter of January 2, 1970, you have presented certain facts concerning the consideration by the Commission of the termination of the probationary appointment of one Armand E. Faber, who had previously received a probationary appointment as 9210 Airport Policeman. You have pointed out that on December 29, 1969, the Commission was advised that the Sheriff of San Mateo County had refused to deputize Mr. Faber as a San Mateo County deputy sheriff. The issue raised before the Commission, and on which you have sought the advice of this office, is whether qualification as a deputy sheriff in San Mateo County is a necessary condition for qualifying for continuance in the position of 9210 Airport Policeman.

You have pointed out that the examination announced for 9210 Airport Policeman includes the following as a requirement: "Before completion of the training program, each appointee must apply to the Sheriff of San Mateo County and receive appointment as a deputy sheriff." Further, the scope of the examination for this position states as follows: "(6) Approval of the Sheriff of San Mateo County for deputization as a Deputy Sheriff . . . Qualifying." You have specifically asked whether there is any legal procedure whereby airport employees in the indicated classification may be deputized by the Sheriff of the City and County of San Francisco rather than by the Sheriff of San Mateo County.



Civil Service Commission

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January 9, 1970

You have also requested information whether revenues resulting from fines levied by reason of parking violations at the Airport could be claimed by the City and County rather than be paid to San Mateo County.

In a recent communication to the Public Utilities Commission, dated November 21, 1968, this office considered the issues raised by your first request. At that time it was concluded that City's "airport policemen" were without police authority unless the procedures are followed which are set forth in Section 26600.2 of the Government Code. This section reads as follows:

"Whenever a county or city owns land in another county, it may request the sheriff of that county to deputize its officers or employees as deputy sheriffs so that they may perform police duties solely upon said land. The sheriff may appoint such deputies."

Prior to the enactment of said section, it was held by the Attorney General of California, in his Opinion 59-220, dated October 26, 1960, that airport attendants at San Francisco International Airport are not deemed peace officers under Section 817 of the Penal Code. Said Penal Code section contains an enumeration of what officers are regarded as peace officers for the performance of arrests and other duties authorized under the Penal Code and other statutes and ordinances.

For the reasons expressed, the conclusion is inevitable that qualification as a deputy sheriff of San Mateo County is a necessary condition of qualification for the position of 9210 Airport Policeman. The Sheriff of San Mateo County is the officer who is given the statutory power, acting in his discretion, regarding the deputization of deputy sheriffs within San Mateo County. For this reason, the Sheriff and other officers of the City and County of San Francisco are legally precluded from performing the extra-territorial functions of deputizing such persons as sheriffs within San Mateo County.

Regarding the second question in your letter concerning the possible claim of fines resulting from citations issued by airport policemen in San Mateo County, it should be noted that this matter also was covered in a letter to the manager of utilities, October 15, 1957. At that time, this office concluded that under the statutes then existing, fines, forfeitures, deposits in court, and unclaimed bail were required to be disposed of to the County Treasurer for the use of the County in which arrests were made.



Civil Service Commission

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January 9, 1970

A review of the statutes at the present date indicates no change in the answer which must be given to the question you have raised. A review of Section 1463 of the Penal Code, Section 71006 of the Government Code, and Sections 42200, 42201, and 42201.5 of the Vehicle Code, indicates that absent a change in law by the Legislature, fines and other penalties collected at the San Francisco International Airport are required to be paid to San Mateo County.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
1970 FEB 25 PM 4:43  
ALMOND, J. I. VI  
ASSISTANT



January 13, 1970

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Mr. Norman C. Ecklund, Director  
Recruitment and Examinations  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Re: Legality of Waiver of Right of Action by  
Eligibility Workers on Pre-application  
Forms

Dear Mr. Ecklund:

This is in response to your letter in which you requested an opinion on the use of certain language contained in the pre-application form for Class 2903 Eligibility Worker.

The applicant is required to sign a statement as follows:

" . . . I hereby waive any right of action that I might have against any and all such former employers and the companies they represent for any liability or cause of action for any damages whatsoever."

This language was apparently intended to constitute a waiver by the applicant of any defamation action resulting from a former employer's communication to the Civil Service Commission about the applicant's employment record.

For a valid waiver the courts require an intentional relinquishment of a known right (Occidental Life Ins. Co. v. Cranston, 237 C.A. 2d 402. The waiver in the form is not limited to known rights, but purports to include "any right" that the applicant "might have." In this regard the language in the form is too sweeping to constitute a valid waiver.

Although the waiver was apparently to protect against defamation action, the language in the form is not specific. It includes "any right" for "any liability or cause of action for

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Mr. Norman C. Ecklund

- 2 -

January 13, 1970

any damages whatsoever." As the waiver is not clear as to what right is to be relinquished, the waiver would be unenforceable. A waiver of a right cannot be established without clear showing of intent to relinquish the particular right. In cases where there is some doubt, the courts have held against the waiver (Speegle Inc. v. Fields, 215 C.A.2d 546).

In addition to being too general to constitute a waiver, the language appears to be unnecessary. Former employers are already provided protection by Civil Code Section 47(3), which provides that a communication is privileged when it is made ". . . without malice to a person interested therein . . . by one . . . who is requested by the person interested to give the information." The courts have held that communications by former employers to potential employers are privileged under Section 47(3) where they are made without malice (Lesperance v. North American Aviation, Inc., 217 C.A.2d 336).

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
1970 FEB 25 PM 4.43  
ALM. N. TH. T. VI  
ASSISTANT

January 20, 1970

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Fire Commission  
260 Golden Gate Avenue  
San Francisco, California 94102

Attention: Mr. Raymond G. Connors, Jr.  
Secretary

Subject: Use of Fire Houses for VISTA Program  
of Helping the Low Income Group with  
Their Income Tax Forms

Gentlemen:

This is in response to your letter requesting my opinion on whether the Fire Commission has the authority to grant a request of VISTA to use the fire houses to help the low income group in the filing of new tax forms; and if the Commission does have the authority, how is potential liability handled.

In my opinion the Fire Commission does have the authority to grant VISTA's request for the use of fire houses for the purpose of helping the low income group with their income tax forms. This is not a situation where use of a public building is sought by a private organization for private purposes. VISTA is an agency of the United States Government.

City Attorney Opinion dated April 7, 1964, No. 64-6, concerned the use of San Francisco fire houses for historical museum purposes. Therein I advised that the Fire Commission could provide for the establishment of a fire department museum, subject to the provision that there would be space available which was not necessary for active fire fighting equipment and so long as the museum did not interfere with the primary fire fighting purposes for which the fire house was constructed with bond funds.

The Fire Commission could, with discretion, authorize the use of fire houses for the VISTA proposal, provided there is space available and provided said proposal does not interfere with the primary fire fighting purposes for which the fire house

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Fire Commission

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January 20, 1970

was constructed with bond funds. The museum was to be publicly maintained and controlled. The VISTA proposal is a public project of a governmental agency.

In response to your second question concerning potential liability, there should be included in the agreement for the use of the fire houses, an agreement by the federal government to indemnify the City and County of San Francisco against all liability arising out of the operation of the VISTA program.

If the Commission decides in its discretion to agree to the VISTA proposal, the Commission should see that a satisfactory plan and program is worked out before permission for use of the premises for this purpose is granted. If you desire that I review the plan to protect the public against potential liability, I shall be pleased to consult with you at your convenience.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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January 30, 1970

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Mr. George J. Grubb  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Eligibility of Korean Veteran to a  
Veteran's Preference Under Present  
Civil Service Rules

Dear Mr. Grubb:

This is in reply to your request for opinion whether an examination candidate who was in the military service from September 10, 1953, to September 9, 1956, is entitled to a veteran's preference in a civil service examination. The candidate served in Korea and was awarded the National Defense Service Medal, the United Nations Service Medal, the Korean Service Medal and the Good Conduct Medal.

Section 145 of the Charter provides that veterans who are eligible for appointment by attaining a passing mark in any entrance examination shall be allowed an additional credit of 5 per cent in making up the list of eligibles; and a credit of 3 per cent in the case of promotive examinations. "Veteran" is defined in section 145 as any person who has been mustered into, or served in, one of the named branches of military service in time of war and received an honorable discharge or certificate of honorable active service. "Time of war" is defined in section 145.01 of the Charter. It provides:

"In the administration hereafter of the provisions of section 145 of this charter, . . . the expression, time of war, shall include the following periods of time:

"(a) The period of time from the commencement of a war as shown by any declaration of war of the Congress of the United States, or by any statute or



Mr. George J. Grubb

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resolution of the Congress a purpose of which is to declare in any manner the existence of a state of war, until the time of termination thereof by any truce, treaty of peace, cessation of hostilities, or otherwise.

"(b) The period of time during which the United States is or has been engaged in active military operations against any foreign power, whether or not war has been formally declared.

"(c) The period of time during which the United States is or has been assisting the United Nations or any nation or nations in accordance with existing treaty obligations, in active military operations against any foreign power, whether or not war has been formally declared.

"(d) The period of time during which the United States is engaged in a campaign or expedition in which a medal has been authorized by the government of the United States; provided, however, that no person shall be eligible for the benefits provided for veterans in section 145 unless he shall have been eligible to receive such a medal. [New section, 1968]"

The Korean War commenced on June 27, 1950, with the invasion of South Korea by the North Koreans, and actual hostilities terminated on July 27, 1953, with an armistice between the United Nations Command, the Korean People's Army, and the Chinese People's Volunteers. Even though active hostilities ceased in Korea on July 27, 1953, the President of the United States set February 1, 1955, as the terminal date for certain veteran's benefits and services. (See, e.g., Presidential Proclamation 3080, dated January 1, 1955, U.S. Code Congressional and Administrative News, 84th Congress, 1955, p. 985.) War is generally considered to be terminated on the final cessation of hostilities following an armistice or cease fire which contemplates complete peace. (See Schneiderman v. Metropolitan Cas. Co. of N.Y., 220 N.Y.S.2d 947, 950-951.) Accordingly, the Korean War terminated in fact with the armistice on July 27, 1953, even though a technical state of war continued after that date for the purpose of granting various veteran's rights and benefits.

The definition of "time of war" in paragraph (a) of section 145.01 of the Charter covers that period from commencement

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Volume 100, Part 1, 1970  
January 1970

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Mr. George J. Grubb

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January 30, 1970

of a war until termination thereof by "truce, treaty of peace, cessation of hostilities, or otherwise." It is my opinion that the word "otherwise" refers to alternate measures of terminating the war which are not specified in paragraph (a). Under the definition in this paragraph, the Korean War terminated with the armistice and cessation of hostilities on July 27, 1953.

Paragraphs (b) and (c) of section 145.01 of the Charter both define time of war as the period of "active military operations" against any foreign power. It is my opinion that the phrase, "active military operations" in paragraphs (b) and (c) of section 145.01 contemplates actual conflict with enemy forces and does not include that period of time after armistice or cease fire in which occupation or security forces are maintained to insure the peace. Active military operations ceased in Korea with the armistice on July 27, 1953, even though occupation and security forces remained after that date.

It is my opinion that Rule 10, section 7(c) of the Rules of the Civil Service Commission properly specifies the dates during which active military operations were conducted in Korea, i.e., from June 27, 1950, to July 27, 1953. The subject candidate would not be eligible for a veteran's preference under paragraph (a) of section 145.01 of the Charter because he did not serve in Korea prior to the cessation of hostilities on July 27, 1953. Also, he would not be eligible for a veteran's preference under paragraphs (b) and (c) of section 145.01 because the subject candidate was not in the military service during a period of "active military operations" against a foreign power.

The electorate amended section 145.01 of the Charter in November 1967 to add paragraph (d). That paragraph includes within the definition of "time of war" the period of time during which the United States is engaged in a campaign or expedition in which a medal has been authorized by the United States Government and when the examination candidate has been eligible to receive such a medal. The Department of the Army manual on "Awards" classifies the National Defense Service Medal, the United Nations Service Medal and the Korean Service Medal as service or campaign medals awarded for "honorable performance of military duty within specified limiting dates in specified geographical areas." (See Chapter 1, Section IV, Army Regulations AR 672-5-1, p. 17.) The Good Conduct Medal is awarded for "exemplary behavior, efficiency, and fidelity in active Federal military service." (See Chapter 1, Section III, Army Regulations, *supra*, p. 16.1.)



Mr. George J. Grubb

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January 30, 1970

It is my opinion that the National Defense Service Medal, United Nations Service Medal and the Korean Service Medal are campaign or expedition medals authorized by the government of the United States within the meaning of paragraph (d) of section 145.01 of the Charter, and since the subject candidate has been awarded those medals, he is entitled to the veteran's preference provided by section 145 of the Charter.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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ASSISTANT



January 30, 1970

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Mr. John J. Donovan, Administrator  
Assessment Appeals Board  
Room 2-B City Hall  
San Francisco, California 94102

Subject: Assessment of 318 Turk Street  
Assessor's Block 337, Lot 7A  
William C. Blake

Dear Mr. Donovan:

This is in response to your letter of January 5, 1970, requesting my opinion as to whether Mr. Blake is entitled to a hearing before the Assessment Appeals Board on his petition for equalization signed by him on December 8, 1969, and received by your office on December 15, 1969. A letter dated January 9, 1970, which the petitioner addressed to the Assessment Appeals Board, states that "the petitioner alleges on information and belief that the Assessor failed to make adequate notice of an increased assessment to the petitioning taxpayer as required by Section 619 of the Revenue & Taxation Code."

Section 1607(c) of the Revenue & Taxation Code provides that a petition for reduction in an assessment on the local roll must be filed between July 2 and August 26. Revenue & Taxation Code Section 620 provides for an administrative remedy when the assessor has failed to send notice to the taxpayer in accordance with Revenue & Taxation Code Section 619 and if the circumstances provided for in Section 620 are shown by the evidence, there is an exception to the August 26 filing deadline.

Section 620 provides in part as follows:

"If the assessor does not send a notice pursuant to Section 619 to an assessee . . . whose property's full cash value has increased, then such assessee may pay taxes under protest. . . . Protests shall be made by filing with the tax collector, together with the payment of the taxes or their first installment, a petition for assessment reduction. . . . The



Mr. John J. Donovan

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January 30, 1970

county board may, after receipt of petition for assessment reduction from the tax collector, hold a public hearing at the next regular board meeting. . . ."

Article XIII, Section 9.5 of the Constitution authorizes creation of assessment appeals boards and states that general laws pertaining to "county boards of equalization" shall be applicable to county assessment appeals boards. Assessment Appeals Board Rule 305(d) also provides that Section 620 is an exception to the August 26 filing deadline.

The Assessment Appeals Board is the proper fact-finding body to determine whether the assessor has sent notice to the petitioner in accordance with the provisions of Section 619. Pursuant to my Letter Opinion No. 69-13 of January 20, 1969, the question for the Assessment Appeals Board to determine is whether a notice required by Section 619 was mailed in accordance with the provisions of said section. The alleged failure of the assessee to receive the notice is not determinative of the question of the right to file a late application.

You are advised, therefore, (1st) that the petition should be set for a preliminary hearing on the question of whether notice was sent in accordance with the provisions of Revenue & Taxation Code Section 619; (2nd) if the Board determines that the notice was sent in accordance with the provisions of Section 619, the Board should deny the petition on grounds of lack of jurisdiction; (3rd) if the Board determines that notice was not sent in accordance with Section 619, the Board should proceed to hear the petition for reduction of the assessment.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
1970 FEB 25 PM 4:43  
ADMINISTRATIVE  
ASSISTANT

February 3, 1970

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Mr. R. Spencer Steele  
Zoning Administrator  
100 Larkin Street  
San Francisco, California 94102

Subject: Board of Permit Appeals Decision  
at 1040 Sacramento Street

Dear Mr. Steele:

This is in response to your request for an opinion as to whether the Zoning Administrator should approve a permit application authorizing the erection of a new projecting sign at 1040 Sacramento Street in compliance with an order of the Board of Permit Appeals.

A review of the facts shows that the subject property is located in an R-5 district (Highest Density Multiple Residential District). The proposed sign would project two feet from the building line with a total area of advertising space of 60 square feet. In addition, the sign would be illuminated.

The Zoning Administrator refused to approve the application for a permit and after the applicant was notified of the disapproval, an appeal was filed with the Board of Permit Appeals.

The applicable sections of law are quoted in part as follows:

Planning Code Section 308.2(a):

"Right of Appeal. The action of the Zoning Administrator, in granting or denying a variance application as described in Section 305 and Sections 306 through 306.5, or in making any order, requirement, decision or other determination, other than a variance, shall be subject to appeal to the Board of Permit Appeals in accordance with this Section. . . ." (Emphasis added.)



Mr. R. Spencer Steele

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February 3, 1970

## Planning Code Section 308.2(e):

"Decision. Upon the hearing of any appeal taken pursuant to this section, the Board of Permit Appeals may, subject to the same limitations as are placed upon the Zoning Administrator by Charter or by this Code, approve, disapprove or modify the decision or determination appealed from, in conformity with the following requirements:

"1. . . .

"2. In the case of any order, requirement, decision or other determination of the Zoning Administrator, other than a variance, if the determination of the Board differs from the Zoning Administrator, it shall, in a written decision, specify wherein there was error in interpretation of the provisions of this Code, or abuse of discretion on the part of the Zoning Administrator, and shall specify in its findings, as part of such written decision, the facts relied upon in arriving at its determination."

## Charter Section 117.2:

"There shall be in the department of city planning a zoning administrator appointed subject to the civil service provisions of this charter who shall administer and enforce the zoning and set-back ordinances."  
(Emphasis added.)

## Planning Code Section 307(b):

"Compliance with this Code. The Zoning Administrator shall have authority to take appropriate actions to secure compliance with this Code, through review of permit applications, surveys and record keeping, enforcement against violations as described in Section 309, and other means." (Emphasis added.)

## Planning Code Section 606:

"Residential Districts. Signs in R districts, other than those signs exempted by Section 603 of this Code, shall conform to the following provisions:

# THE JOURNAL OF THE

ROYAL ANTHROPOLOGICAL INSTITUTE

Volume 100, Part 1, 1970

Published by the Royal Anthropological Institute

London, 1970

Printed in Great Britain

0022-2933/70/0000-0000\$01.00



Mr. R. Spencer Steele

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February 3, 1970

"(a) General provisions for all signs:

"1. No sign shall project beyond a street property line or building set-back line.

" . . .

"(b) Signs for uses permitted in R districts. The following types of signs, subject to the limitations prescribed for them, shall be the only signs permitted for uses authorized as principal or conditional uses in R districts, except that signs for any retail sales or service establishments so authorized in R-4 or R-5 districts shall be subject to the limitations of paragraph (c) 3 below.

"1. One non-illuminated or indirectly illuminated name plate for each street frontage of the lot, not exceeding a height of 12 feet, and having an area not exceeding one square foot in R-1-D, R-1 and R-2 districts, or 2 square feet in R-3, R-3.5, R-4 and R-5 districts.

"2. One identifying sign for each street frontage of the lot, not exceeding a height of 12 feet, and meeting the following additional requirements:

"R-1-D, R-1 and R-2 districts: non-illuminated or indirectly illuminated only; maximum area 12 square feet.

"R-3 and R-3.5 districts: maximum area 4 square feet if directly illuminated, and 18 square feet if non-illuminated or indirectly illuminated.

"R-4 and R-5 districts: maximum area 8 square feet if directly illuminated, and 36 square feet if non-illuminated or indirectly illuminated.

" . . ."

From the above mentioned provisions of the law, it is apparent that any decision made by the Zoning Administrator is subject to appeal to the Board of Permit Appeals. It is also evident that the Board of Permit Appeals in hearing a matter on appeal may, subject to the same limitations as are placed upon the Zoning Administrator, reverse or modify the latter's decision.



Mr. R. Spencer Steele

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February 3, 1970

Additionally, the Board of Permit Appeals must indicate that the Zoning Administrator made an error in interpreting the Code or was responsible for the abuse of discretion vested in him.

In this case, the permit application in question was denied upon the basis that the sign to be erected projected beyond the building set-back line and was larger than permitted in that particular zoning area.

In order for the Board of Permit Appeals to reverse the Zoning Administrator, the Board must find that there was error or abuse of discretion. Under the Charter, the Board is subject to the same limitations as are placed upon the Zoning Administrator by the Charter or by Ordinance (City Planning Code).

It is evident from the above discussion concerning the relevant powers and duties of the Zoning Administrator and the Board of Permit Appeals that the Board exceeded its jurisdiction in overruling the Zoning Administrator's disapproval of the permit application to erect the projecting sign in a residential neighborhood, since the above cited provisions of the City Planning Code specifically prohibit a projecting sign in an R-5 district.

The questions referred to this office for an opinion do not concern a disagreement on the facts, but rather involve an erroneous interpretation of the law by the Board of Permit Appeals which under the Charter is not binding on the Zoning Administrator. The Zoning Administrator cannot be compelled to perform acts which are void, illegal, contrary to public policy, or which tend to aid in an unlawful purpose. Even though, normally, approval of the permit application would be a ministerial act, a ministerial officer cannot be coerced into doing that which his duty under the law prohibits him from doing. (See Plum v. City of Healdsburg, 237 Cal.App.2d 308, 317.) In the above case, the Court of Appeal held that a superior court could not mandate a public official to disobey the law when the order of a planning commission was void. Therefore, it is my opinion that the Board of Permit Appeals did not possess the jurisdiction to approve the subject sign application and, further, the Zoning Administrator is not obligated to approve the application under the circumstances.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 11, 1970

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Miss Miriam E. Wolff, Director  
San Francisco Port Commission  
279 Ferry Building  
San Francisco, California 94111

Subject: Rights of Transferred Employees to  
Promotional Positions in Port Service


Dear Miss Wolff:

This is in reply to your letter requesting my opinion whether departmental promotional examinations may be given to establish eligible lists for appointment to vacancies at the San Francisco Port in the positions 1632 Senior Account Clerk and 7238 Electrician Foreman. Eligible lists for those positions were established prior to transfer of the Port to the City and County. You have also raised the question whether the Civil Service Commission has the authority to cancel the existing eligible lists for the subject classes and give a new promotional examination which would be open to the transferred employees.

The Port transfer was authorized by 1968 California Statutes, Chapter 1333, and in accordance with that legislation, an agreement was entered into between the State of California and the City and County. Section 20 of the legislation and Section VIII of the Agreement designate the rights, benefits and privileges of the transferred employees.

Section 20 of 1968 California Statutes, Chapter 1333, provides in part:

"All persons actually employed in the service of the San Francisco Port Authority at the time this act takes effect and who at said date shall be entitled to the benefits of the civil service provisions of the State of California insofar as the same may be applicable to the employees of the San Francisco Port Authority, shall be continued in their respective positions and shall continue to hold their positions pursuant to the civil service provisions of the Charter of the City





Miss Miriam E. Wolff

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February 11, 1970

and County of San Francisco and they shall be entitled to all of the rights, benefits, and privileges which such persons might have or might have had, had such persons been originally appointed to their respective positions under certification from the civil service commission of the City and County of San Francisco, and in the matter of seniority in service of such employees entitled to the benefits of said civil service provisions as herein provided, the seniority of each employee shall be reckoned from his first permanent appointment to employment under the State of California, and as to their respective positions such employees shall have preference over all other employees of the City and County of San Francisco. The employment rights of such state employees shall be fully protected at the time of the transfer authorized by this act. Salary, employment conditions, and benefits shall be no less than those received by the employees of the San Francisco Port Authority at the time of transfer. These rights and benefits include, but are not limited to: probationary or permanent civil service status, and any career executive appointments; retention of employees' positions on existing subdivisional and departmental promotional and eligible lists, as long as they are in effect; . . ."

(Emphasis added.)

Section VIII of the Agreement provides in part:

"An employment condition and benefit of the transferred employees is the right to take competitive examinations for other positions in State service. Six months after the transfer the transferred employees will have lost this right in State service, but the City shall afford a similar right in City service in the same manner and to the same extent as it would afford to the employees had they been city employees originally. . . ."

The general intent of the legislation and of the Agreement is that the transferred employees will not be adversely affected by reason of the transfer. Hence, Section 20 of the legislation provides that the transferred employees shall be continued in their respective positions and that their "salary, employment conditions and benefits shall be no less than those received" at the time of transfer. Further, the legislation provides that the transferred employees "shall be entitled to all





Miss Miriam E. Wolff

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February 11, 1970

the rights, benefits, and privileges which such persons might have or might have had, had such persons been originally appointed" as City and County employees.

Eligible lists for promotion to the subject positions were established prior to the Port transfer on February 7, 1969. It is my opinion that the appointment of eligibles from those lists to vacancies at the Port would be in conflict with the intent and specific language of both the legislation and the Agreement. Section 20 of 1968 Statutes, Chapter 1333, specifically grants the transferred employees "all of the rights, benefits, and privileges which such persons might have or might have had, had such persons been originally appointed" as City and County employees. This language clearly gives the transferred employees the same rights as though they had been originally certified as City and County employees. As original City employees the transferees would have been entitled to participate in promotional examinations held before the transfer, assuming they were otherwise eligible. The transferred employees did not so participate and therefore they have not received all the rights, benefits and privileges that they might have had if originally appointed as City employees. The denial of an opportunity to promote which has been afforded to other City employees of equal seniority would be in violation of the provisions of the legislation and agreement.

Section VIII of the Agreement entered into between the state and the City and County provides that the right to take competitive examinations is an employment condition and benefit of the transferred employees. The City is required to afford a similar right in City service to the same extent as if such employees were originally appointed as City employees. I am advised that it was a practice of the state to hold departmental promotional examinations to fill vacancies occurring at the Port and that the quoted provisions of Section VIII of the Agreement was intended to preserve the rights of the state employees to take departmental examinations at least until such time as the transferred employees would be eligible to compete in regular city-wide examinations. It is my opinion that the quoted language of Section VIII requires the City to give departmental examinations to the transferred employees so that they can have the opportunity to promote in City service in the same manner as if they were originally certified as City employees.

Section 48.4 of the Charter provides:



Miss Miriam E. Wolff

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February 11, 1970

"Notwithstanding any of the provisions of this charter, the city and county shall perform all acts necessary to protect the employment rights of employees of the Port Authority as specified in Section 20 of Statutes 1968, ch. 1333."

This section authorizes the City to perform all acts necessary to protect the employment rights of the transferred employees. It is my opinion that the holding of departmental promotional examinations at the Port is the only method to protect the promotive opportunities of the transferred employees because if eligibles on current promotional lists were certified to vacancies at the Port, the transferred employees would be denied rights, benefits and privileges which they "might have had" if originally appointed as City employees. Departmental promotional examinations are thereby necessary by reason of the legislation and Agreement to insure that the transferred employees will have the same promotive opportunities as City employees of equal seniority.

The giving of departmental examinations will result in establishing two eligible lists for the same class. Rule 14 of the Rules of the Civil Service Commission provides that when two lists are established for the same class, those eligibles holding places on the first list shall be given preference. Under this rule, the eligibles on lists established prior to the transfer would have preference over eligibles on a subsequent departmental promotional list. However, the legislation and Agreement relating to the transfer and Section 48.4 of the Charter are specific in designating the rights of the transferred employees and controls other provisions of the Charter and Rules of the Civil Service Commission in this matter. Accordingly, it is my opinion that vacancies at the Port must be filled from departmental promotional lists and not from eligibles on lists created before the transfer. The promotive rights of eligibles on current lists are not affected by this conclusion because it was not contemplated that they would be appointed to the Port when the lists were established. Thus, eligibles on current lists should be certified to vacancies in all City departments except the Port.

You have also inquired whether the Civil Service Commission can cancel the eligible lists established prior to the transfer and hold an open promotional examination in which the transferred employees may participate. The registers of eligibles for Class 1332 Senior Account Clerk and 7238 Electrician Foreman were adopted on March 25, 1968, and July 22, 1968, respectively,



Miss Miriam E. Wolff

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February 11, 1970

and each list will automatically expire four years after its adoption. Section 145 of the Charter provides that "the Commission may remove all names from the list of eligibles after they have remained thereon for more than two years and all names thereon shall be removed at the expiration of four years." This is the only authority to cancel a list of eligibles. (See Cook v. Civil Service Com., 160 Cal. 598.) It is therefore my opinion that the Civil Service Commission has authority to cancel the subject lists after they have been in existence for two years and it may then hold new open promotional examinations for those classes.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 18, 1970

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Mr. Emmerly Mihaly  
Registrar of Voters  
155 City Hall  
San Francisco, California 94102

Subject: Procedure for Placing Declaration  
of Policy Submitted by Six  
Supervisors on Ballot

Dear Mr. Mihaly:

You have requested my opinion with respect to the propriety of placing a declaration of policy bearing the signatures of six members of the Board of Supervisors on the ballot for the June 2, 1970 primary election.

Section 179 of the Charter, relating to initiative, referendum and recall, provides in part as follows:

"Any declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances; . . .

"Any ordinance which the supervisors are empowered to pass may be submitted to the electors by a majority of the board at a general election or at a special election called for the purpose, said election to be held not less than thirty days from the date of the call. Any such ordinance may be proposed by one-third of the supervisors or by the mayor, and when so proposed shall be submitted to the electors at the next succeeding general election. . . ."

Accordingly, it is clear that the subject declaration of policy, having been submitted by six members or a majority of the Board, may be submitted to the electors at either a general or special election. However, the term "a general election" used in Section 179, *supra*, is not defined therein and gives rise to the question whether the primary election to be held on June 2, 1970, is "a general election" within the meaning of said section.





Mr. Emmery Mihaly

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February 13, 1970

In Bigelow v. Board of Supervisors (1912) 13 Cal.App. 715, the court held that a primary election could not be considered to be a general election.

In County of Alameda v. Sweeney (1957) 151 Cal.App.2d 505, the court held that the term "a general election" as used in article XI, section 7-1/2 of the State Constitution includes the direct primary election. The court questioned that the Bigelow case, supra, had held that in every event the only general election is the general election, i.e., the election held throughout the state on the first Tuesday after the first Monday of November in each even numbered year (Elections Code, §23) but stated that if it were so interpreted it was no longer the law. In reaching its decision, the court, after noting that the direct primary law had been changed since the Bigelow case, stated as follows:

"All of the attributes of a general election so far as they pertain to the requirements of section 7-1/2 are now present at the direct primary election. It occurs at stated intervals as fixed by law without any superinducing cause other than the efflux of time. All electors in addition to the notice of proposals to be presented required by section 7-1/2, receive a full notice of the election and of the measures to be voted on as at the general election. No elector is denied a ballot; he may vote on all measures submitted at the election and for all candidates except only certain partisan candidates for party nomination. The fact that he is denied the privilege of nominating a candidate of a party not of his choice does not take away the general election aspects of the election in view of all the other aspects of the election. . . ." (151 Cal.App.2d 505, p. 512.) (Emphasis by court.)

In the light of the foregoing, it is my opinion that a court, if presented with the question whether the direct primary election to be held on June 2, 1970, is "a general election" within the meaning of Section 179 of the Charter, would follow the ruling of the Alameda County case, and would rule in the affirmative. Accordingly, it is my opinion that the subject declaration of policy may properly be submitted to the electors of the City and County on the ballot for the June 2, 1970 Direct Primary Election.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 20, 1970

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FEB 23 1970

Mr. Wallace Wortman  
Director of Property  
450 McAllister Street  
San Francisco, California 94102

Subject: Legal Interest of the State of  
California in Portion of Davis Street

Dear Mr. Wortman:

This is in response to your request for an opinion as to the nature and extent of the State of California's interest in and to Davis Street between Sacramento and Clay Streets as of the date of this letter.

The City and County of San Francisco does own the beneficial interest to the underlying fee title of Davis Street between Sacramento and Clay Streets. In 1968, the State Legislature enacted legislation known as the "Burton Act" (Laws of 1968, Chapter 1333), which legislation authorized the State Director of Finance to negotiate an agreement with the City and County of San Francisco subject to the provisions of the Act, which agreement would transfer to City all of the right, title and interest held by the State of California in and to the real property then under the jurisdiction and control of the San Francisco Port Authority. The transfer of the real property would be subject to the trust for commerce and navigation.

Pursuant to this authorization, the Director of Finance and officials of the City and County of San Francisco entered into negotiations and drafted a document entitled "Agreement Relating to Transfer of the Port of San Francisco from the State of California to the City and County of San Francisco," hereinafter called "Agreement." The Agreement was executed on January 24, 1969, recorded in Book "B," 308, page 686. This Agreement provided that the transfer of the real property would take effect on February 7, 1969, if various conditions contemplated by the Burton Act and the Agreement were fulfilled. Such conditions, of course, have occurred and the Port of San Francisco has been transferred from the State of California to City.



Mr. Wallace Wortman

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February 20, 1970

Section II of the Agreement provides for the transfer of real property to the City and the applicable language is quoted in part as follows:

"The real property so transferred lies within the perimeter description set forth in Harbors and Navigation Code Section 1770 and those additional lands which are the properties of the State of California set forth in Harbors and Navigation Code Section 1772."

That portion of Davis Street that is the concern of your request lies within the property as set forth in Harbors and Navigation Code Section 1772. Section 1772 includes the property between the Port jurisdiction line and the Eddy Red Line which was established some years ago. The Agreement and the Burton Act recognize that prior to the actual transfer of deeds, a survey would be made of the transferred lands, which survey would be accomplished within three years from August 14, 1968, the effective date of the Burton Act.

Subsequent to the date of the Agreement and the transfer of the real property, legislation was introduced in the 1969 regular session of the California Legislature and was enacted as the Laws of 1969, Chapter 1474. The Act provided that the described lands, i.e., Davis Street, had ceased to be tide and submerged lands and would therefore be free of the public trust for navigation, commerce and fisheries. The Act further provided that the underlying fee to Davis Street shall be sold at a price equal to the fair market value of the State's interest in said lands. The fair market value of the State's interest in said lands would be determined by an agreement between an appraiser representing the State Lands Commission and an appraiser representing the City and County of San Francisco. In the event the two appraisers were unable to agree, they would appoint a third appraiser who then would determine the fair market value. Cost of the appraisers were to be borne by the City and County of San Francisco.

The Burton Act and the Agreement transferred all right, title and interest in that portion of Davis Street to the City and County of San Francisco, subject only to the trust for commerce and navigation and reservation of subsurface mineral deposits. Chapter 1474 Laws of 1969 removed the trust from the area of Davis Street with which we are presently concerned. Under all of the aforementioned laws and Agreement, it would appear that the value of the State's interest to be appraised would be nominal only.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 26, 1970

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Mr. S. M. Tatarian, Director  
Department of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Port Commission; Jurisdiction of  
Department of Public Works  
Concerning Traffic Control

Dear Mr. Tatarian:

This is in response to your letter presenting the following questions:

- "(1) Does the responsibility for traffic regulations on 'Port' streets, such as 'STOP' locations, 'NO LEFT TURN' and parking time limits rest with the Board of Supervisors, and if so, is it a responsibility of the Department of Public Works to make recommendations on these matters to the Board?
- "(2) Is it a responsibility of the Department of Public Works to install and maintain traffic control devices on 'Port' streets in the manner prescribed in Section 107.1 of the Charter and the Traffic Code?"

The authority to adopt penal traffic regulations with reference to "STOP" locations, "NO LEFT TURN" and parking time limits on the public streets of the City and County is vested in the Board of Supervisors by the provisions of the Vehicle Code of the State of California. (See §§ 385, 21100, 21101, 21351, 21354, 21356, 22113 and 22507.)

With specific reference to parking regulations, the Board of Supervisors has enacted Section 220 of the Traffic Code which prohibits the parking of vehicles on property under the jurisdiction of the Port Commission, including thoroughfares, except with the permission of and subject to such conditions and regulations as are imposed by the Commission. Thus, the Board of





Mr. S. M. Tatarian

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February 26, 1970

Supervisors has delegated authority to the Commission to designate parking areas and the time limits thereof on property and public streets under its jurisdiction. Accordingly, it is the responsibility of the Port Commission to install and maintain parking control signs and devices in such areas pursuant to the conditions and regulations they have established.

As to other traffic regulations on the public streets within the Port area, such as "STOP" locations and turning movements, the authority to legislate in these matters rests with the Board of Supervisors. When such legislation has been adopted absent a delegation of authority to the Port Commission or an agreement with the Commission to install and maintain traffic control devices to effectuate such legislation, the Department of Public Works has the same jurisdiction and responsibility with reference thereto as it has with reference to other public streets within the City and County.

However, the foregoing authority of the Board should be exercised consistently with the powers and duties vested in the Port Commission by the Charter to control and manage the Port area for the purpose of commerce and navigation and as traffic control regulations have a definite relationship to the use of the Port area for such purposes, the agreement of the Port Commission or its authorized representative should be secured before such regulations are adopted. Section 107.1(e) of the Charter provides that the Department of Public Works shall cooperate for the best performance of its traffic control functions with any department and agency of the City and County as may be necessary. This provision of the Charter is especially pertinent here.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
1970 MAR 26 PM 3:54  
ASSISTANT  
MAYOR

March 6, 1970

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Mr. Joseph E. Tinney, Assessor  
101 City Hall  
San Francisco, California 94102

Subject: Taxation of Locally Manufactured Goods  
Deposited in a Foreign Trade Zone on  
the Lien Date for Future Foreign Export

Dear Mr. Tinney:

You have asked this office for an opinion as to whether locally manufactured goods deposited in a Foreign Trade Zone on the lien date for future foreign export would be taxable by the City and County of San Francisco.

Section 1 of Article XIII of the Constitution of the State of California requires:

"All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value . . . ."

Article I, Section 10, Clause 2 of the United States Constitution, in part provides:

"No state shall . . . lay any import on duties or . . . exports. . . ."

However, it is settled that the mere fact that goods are intended or destined for export does not exempt them from a municipal property tax. Such immunity attaches when, but not until such goods have actually started toward their destination in a movement which is intended to be continuous. To determine whether specific goods have in fact entered the export stream, both the California Supreme Court and the United States Supreme Court apply the test which requires both the start of a continuous foreign journey and certainly of foreign destination.



Mr. Joseph E. Tinney

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March 6, 1970

Empresa Siderurgica v. County of Merced (1949) 32 C.2d 68, aff'd 337 U.S. 154, 93 L.Ed. 1276. (Emphasis added.)

Whether specific goods are exports then becomes a question of fact which must be determined by asking two questions:

1. Has the continuous foreign journey started? and,
2. Is there a certainty that once this journey has started that the goods will continue on their way to a foreign destination without being diverted to domestic use?

If the answers to these questions are in the affirmative, then the subject goods are exports and nontaxable by the local taxing authority. Article I, Section 12, Clause 2, U.S. Constitution. Empresa Siderurgica v. County of Merced, supra.

The above mentioned test would apply universally to all property in California on the lien date whether it be in a Foreign Trade Zone or mixed with the general mass of property. The State of California does not yield any of its taxing authority by virtue of the fact that a taxpayer places goods in a Foreign Trade Zone. A Foreign Trade Zone has been described as follows:

"A free port or free zone is a place limited in extent but differs from adjacent territory in being exempt from customs laws as affecting goods destined for reexport. \* \* \* A free zone may be defined as an isolated, inclosed, and policed area in or adjacent to a port of entry, without resident population, furnished with the necessary facilities for lading and unloading, \* \* \* without payment of duties and without the intervention of customs officials. It is subject a little (sic) within adjacent regions to all the laws relating to public health, vessel inspection, postal service, labor conditions, immigration, and indeed everything except the customs. (Emphasis added.) The purpose of the free zone is to encourage and expedite that part of a nation's foreign trade which its government wishes to free from the restrictions instituted by custom duties. In other words, it aims to foster the dealing in foreign goods that are imported, not for



Mr. Joseph E. Tinney

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March 6, 1970

domestic consumption but for reexport to foreign markets and for the conditioning or for combining with domestic products previous to exports." Cong. Rec., Vol. 78, Part 9, p. 9853.

There is nothing in this definition which in any way suggests that the local taxing authority would lose its jurisdiction to tax goods that did not otherwise qualify as exports other than the fact that they were deposited by their owner in the zone. Fountain v. New Orleans Public Service, Inc., 265 F. Supp. 630 (1967). Therefore, the local taxing authority must follow the California constitutional mandate of taxation of all property not otherwise exempt.

You are accordingly advised that goods deposited in a Foreign Trade Zone are taxable as part of the general mass of property within the State of California.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MARCH OFFICE  
970 APR - 1 APR 25



March 6, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Proposed Ordinance Authorizing Civilian  
Employees of Police Department to Direct  
Traffic; Conflict with Charter

Dear Mr. Dolan:

In your February 18, 1970 letter, you state that Supervisor Terry A. Francois, Chairman of the Fire, Safety and Police Committee, has been advised that the subject proposed ordinance which is presently pending before his committee would be violative of Section 35 of the Charter, and you request my opinion in this matter.

The proposed ordinance would amend Section 12 of the Traffic Code so as to authorize "any regularly employed and salaried civilian employee of the Police Department designated by the Chief of Police to direct traffic."

Section 35 of the Charter, relating to the Police Department, provides in part that: "The police commissioners . . . shall have power to regulate traffic by means of police officers and the emergency use of temporary signs or devices." However, the term "police officers" is not defined in Section 35 and this presumably raises the question as to whether or not the persons designated in the proposed ordinance are "police officers" within the contemplation of Section 35 of the Charter.

Section 21100 of the Vehicle Code empowers local authorities such as a board of supervisors to enact ordinances regulating traffic by means of "traffic officers." Section 625 of said Code defines a "traffic officer" as: "Any member of the California Highway Patrol, or any peace officer who is on duty for the exclusive or main purpose of enforcing the provisions of Division 10 ["Accidents and Accident Reports"] or 11 ["Rules of the Road"] of



Mr. Robert J. Dolan

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this Code." Among the persons included within the term "peace officer" as defined in the Penal Code is "any policeman of a city" (§ 830.1), and "any qualified person . . . deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman, . . . and . . . assigned specific police functions by such authority, . . .; provided, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment." (§ 830.6.) The term "qualified" as used in Section 830.6 requires, at the very minimum, that the person meet the standards prescribed by the appointing authority, be a citizen of this state under Government Code Section 24103, and not have suffered a prior felony conviction. (51 Ops. Cal. Atty. Gen. 110, 111.) Section 35.9 of the Charter provides that the Chief of Police may, at his discretion, appoint special police officers.

It is well established that the regulation of traffic within a city is not a municipal affair over which a chartered city has exclusive power but is a matter of statewide or general concern, as to which the State Legislature has paramount authority. (Pipoly v. Benson, 20 Cal.2d 366, 369; Mervynne v. Acker, 189 Cal.App.2d 558.)

It is a fundamental canon of statutory interpretation that a statute be construed to avoid unconstitutionality if it can reasonably be so interpreted (Long v. Anaheim, 255 Cal.App.2d 191). Accordingly, it is my opinion that the term "police officers" as used in Section 35 of the Charter should be interpreted as including special police officers appointed by the Chief of Police pursuant to the provisions of Section 35.9 of the Charter and assigned specific police functions by the Chief of Police, to wit, enforcing the provisions of Division 11 of the Vehicle Code. Such interpretation would obviate any possible conflict between the Charter and paramount state law.

In view of the foregoing, it is my further opinion that the language of the proposed ordinance be amended so as to conform to the language of the enabling state law.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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March 25, 1970

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Alfred J. Nelder, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Subject: Charter Section 35.5.1; Certification  
by Civil Service Commission of Rate of  
Compensation to be Paid Police Officers  
or Patrolmen

Dear Chief Nelder:

This is in response to your letter of March 16, 1970, in which you request an opinion interpreting Charter Section 35.5.1 as it relates to the certification of rates of compensation to the Board of Supervisors by the Civil Service Commission under the facts in your letter and the pertinent San Jose Ordinance, to which you refer.

Pursuant to Charter Section 35.5.1 the Civil Service Commission shall survey and certify to the Board of Supervisors rates of compensation paid police officers or patrolmen employed in the respective police departments in all cities of 100,000 population or over in the State of California, and the Board of Supervisors shall have the power and duty by ordinance to fix the rates of compensation. The Charter section further provides:

"The rates of compensation fixed in said ordinance,

"(a) for the fourth year of service and thereafter for police officers, police patrol drivers and women protective officers shall not exceed the highest rate of compensation paid police officers or patrolmen in regular service in the cities included in the certified



Alfred J. Nelder, Chief

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March 25, 1970

report of the civil service commission; . . ."

Charter Section 35.5.1 then defines rates of compensation as follows:

"The expression 'rates of compensation,' as used in this section in relation to said survey, is hereby declared to apply only to a basic amount of wages, with included range scales, and does not include such working benefits as might be set up by any other city by way of holidays, vacations, other permitted absences of any type whatsoever, overtime, night or split shift, or pay for specialized services within a classification or rank, or other premium pay differentials of any type whatsoever. The foregoing enumeration is not exclusive, but it is the intent of this section that nothing other than a basic amount of wages, with included range scales, is to be included within the meaning of 'rates of compensation.'"

The City of San Jose, California, is one of the cities used in the survey by the Civil Service Commission. San Jose has passed an ordinance on October 6, 1969, providing for career incentive pay for various classifications in the Police Department. That ordinance (No. 14027) provides that police officers (among many other classifications in the Police Department) who have been awarded the Intermediate Certificate given by the Commission on Peace Officer Standards and Training of the State of California shall be paid, in addition to the salary fixed and established for said class title and number, additional compensation equal to the difference between his said salary and the salary that is specified in Section 2403.1 of this Chapter at his salary rate in the salary range that is approximately 5% higher than his salary range. To be entitled to the additional compensation the police officer must file his Intermediate Certificate with the Director of Finance.

The San Jose ordinance, in language identical to that used in granting a 5% increase to an Intermediate Certificate holder, grants  $7\frac{1}{2}\%$  to an Advanced Certificate holder. San Jose then passed an ordinance (No. 14976) on November 10, 1969, which provides, again in the language that was used granting a 5% increase to Intermediate Certificate holders, a 5% increase to one who holds a Basic Certificate and has 10 years continuous service and a  $7\frac{1}{2}\%$  increase to one who holds a Basic Certificate and has 15 years continuous service.

The policemen of the City of San Jose are paid pursuant





Alfred J. Nelder, Chief

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March 25, 1970

to an ordinance and the ranges are designated as Section 2403.1. This section provides as follows:

"2403.1. Schedule of Monthly Salaries.

"The following salary ranges, which designate monthly salaries, constitute and are hereby fixed and established as the basic salary range schedule for officers and positions of employment in the City Government of the City of San Jose having a monthly rate of compensation: . . ."

The section then sets forth the various salary ranges in the same manner as the San Francisco Salary Standardization Ordinance. The net effect of the San Jose ordinances (No. 14027 and No. 14976) is to move the policemen 5% or 7½% above his present salary range depending upon his certificate and in some cases, upon his length of service.

The specific question you asked is whether the Civil Service Commission must certify as a rate of compensation the salary received by those policemen in San Jose receiving the 5% and 7½% additional compensation as set forth above.

In City Attorney's Opinion No. 69-68, dated August 1, 1969, it was concluded that the rate of compensation of Senior Patrolmen of the City of Berkeley must be certified to the Board of Supervisors by the Civil Service Commission. The basis of the opinion was that the salary for that classification was the basic salary and did not include a "premium pay differential." Charter Section 35.5.1 provides that only the basic amount of wages is included and "premium pay differentials of any type whatsoever" are excluded and in that opinion it was pointed out that the classification of Senior Patrolman in Berkeley had only a basic amount of wages attached to it and that the incentive program was a qualification to make one eligible for the basic wage. (See Hegarty v. Soher (1961), 190 Cal.App.2d 509.)

The Hegarty case made a distinction between automatic longevity pay and longevity pay contingent upon a certification that the employee's standard of service is satisfactory. This certification of satisfactory service made the longevity pay a privilege earned by merit and not a right. It was on this basis that the court concluded that this type of longevity pay was a premium pay differential and not part of the "rate of compensation"



Alfred J. Nelder, Chief

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March 25, 1970

as defined in Charter Section 35.5.1.

In the San Jose ordinance the increases involved are not automatic and, therefore, not a right but a privilege to be earned by obtaining the certificate issued by the state. Further, it is stated in the San Jose ordinances to be additional compensation to a basic wage range as established by Section 2403.1 of the San Jose ordinance establishing basic salary range schedules.

It is my opinion that the 5% and 7½% additional compensation paid San Jose police officers in accordance with the aforementioned San Jose ordinances constitute a premium pay differential. As a premium pay differential they are excluded from the certification of the Civil Service Commission by Charter Section 35.5.1.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 1, 1970

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Mr. R. Spencer Steele  
Zoning Administrator  
Department of City Planning  
100 Larkin Street  
San Francisco, California 94102

Subject: Immunity of Iranian Consulate from  
Zoning Restrictions

Dear Mr. Steele:

This is in response to your letter inquiring as to the application of local zoning laws to an Iranian consular establishment proposed for San Francisco.

The general zoning regulations of the City and County of San Francisco are found in the City Planning Code, Part II, Ch. II, of the San Francisco Municipal Code, section 101 of which provides:

"This City Planning Code is adopted to promote and protect the public health, safety, peace, morals, comfort, convenience and general welfare. . . ."

It is well to keep in mind that zoning regulations are police measures (Hurst v. Burlingame [1929], 207 Cal. 134, 138) enacted pursuant to the constitutional police powers of the city and county.

With these general principles in mind, each treaty of the country or consulate requesting exemption from local zoning laws must be independently reviewed.

This office has investigated whether a Consular Treaty between Iran and the United States is presently in effect. According to information compiled by the Department of State, Treaties



Mr. R. Spencer Steele

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April 1, 1970

in Force, Jan. 1, 1968, Dept. of State, at page 107, and recently confirmed by telephone with the Department of State, there is presently in existence a treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, entered into force on January 16, 1957.

Without question, a treaty entered into by the United States is the supreme law of the land and thereby preempts application of any state or local legislation in opposition to it. (U.S. Const., art. VI.) Therefore, the question ultimately is whether the general zoning regulations of the City and County of San Francisco are preempted by any language contained in the 1957 Treaty between the United States and Iran. As was stated in Opinion #1485 of this office, November 9, 1960:

"Therefore, any local zoning laws inconsistent with the terms of a treaty between the United States and the sending nation are superseded by the treaty provisions. If a sending nation claims an exemption from local zoning regulations, such exemption must be based upon a treaty provision to that effect with that particular sending nation. In the absence of such a treaty, our local zoning ordinance regulates the use to which a sending nation may put its property."

This office has examined the treaty of 1957 between the United States and Iran, and discussed the subject of this letter with the Department of State. It is my opinion, concurred in by the Department of State, that there are no treaty provisions in force between the United States and Iran which would interfere with the application of local zoning laws to a consular establishment or residence.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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April 1, 1970

Mr. George J. Grubb  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Authority to Create Class in Fire  
Department for Trainees and Have  
Promotional Examination to H-2  
Fireman

Dear Mr. Grubb:

This is in response to your letter of March 20, 1970, in which you inquire whether or not it is legally possible to implement a program whereby a new class will be created in the Fire Department in order to employ trainees who will meet the physical requirements as set forth in the Charter for the regular uniformed force of the Fire Department. In the event that such a class can be created, you further ask if promotive examinations may be held, in conjunction with entrance examinations, from this class to the position of H-2 Fireman.

Section 36 of the Charter provides for the several ranks of the Fire Department and a trainee is not included. Accordingly, such a rank could not be created in the Fire Department. See City Attorney's Opinion No. 69-75, dated August 6, 1969.

Section 20 of the Charter provides that each department head may suggest the creation of positions subject to the appropriate provisions of the Charter. Section 20 also provides that the chief executive appointed by a commission has all the powers and duties of a department head. The Chief of the Fire Department is appointed by the Fire Commission (Section 36) so he has the



Mr. George J. Grubb

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April 1, 1970

authority to suggest the creation of positions in the Fire Department.

Section 143 of the Charter provides for the creation of a position in a department. The creation of a position is accomplished by an appropriation ordinance of the Board of Supervisors after the Civil Service Commission gives the position the proper designation and classification based upon the duties and responsibilities thereof.

Based upon Section 20 of the Charter, the Chief of the Fire Department may suggest the creation of a trainee position and under Section 143 the Civil Service Commission may classify the position and the Board of Supervisors may create it. The position would not be a rank in the Fire Department but a civil service position.

The second part of your request deals with the holding of a promotional examination, in conjunction with an entrance examination, from the position of trainee to the rank of H-2 Fireman. This would involve a promotional examination from a civil service position to the beginning rank in the uniformed forces of the Fire Department.

Charter Section 146 provides, in part, as follows:

"Except as specifically provided in other sections of this charter, all promotions in the uniform forces of the police and fire departments, respectively, shall be made from the next lower civil service rank, attained by examinations, as herein set forth, giving consideration also to meritorious public service and seniority of service and a clean record in the respective departments. . . ."

The lowest rank of the uniformed force of the Fire Department is H-2 Fireman and as such lowest rank, it can also be considered the entrance position. Section 145 of the Charter refers to "entrance positions in the uniformed force of the fire department" and refers to H-2 Fireman.

Charter Sections 36, 145 and 146, when read together, present a plan or scheme setting the uniformed forces in a separate category. The plan sets forth the various ranks of the uniformed forces and provides for promotions within the uniformed forces. The Charter, however, is silent on promotion from a



Mr. George J. Grubb

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April 1, 1970

position outside the ranks of the uniformed forces to the entrance position. The language of Sections 145 and 146 does not prohibit such a promotional examination.

The Charter language which confers authority upon the Civil Service Commission to provide for promotional examinations is contained in Charter Section 146 and is stated as follows:

"Whenever it deems it to be practicable, the civil service commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate, and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. The commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion will be made. . . ."

This particular language has been construed in Allen v. McKinley (1941), 18 Cal.2d 697, to give the civil service commission a discretion which will only be interfered with by the courts only when the discretion has been abused.

The facts as presented in your request contemplate a civil service position and not a rank in the uniformed force. It further contemplates a promotional examination to an entrance position in the ranks of the uniformed force, which is not specifically prohibited. It further contemplates the promotional examination to be held in conjunction with the entrance examination which I believe would comply with that portion of Charter Section 145 which refers to "Applicants for entrance positions in the uniformed force of the fire . . . department."

The Civil Service Commission could therefore make the determination, pursuant to the authority granted the Commission in Charter Section 146, that a promotional examination will be held from the position of trainee to the uniformed rank of H-2 Fireman, and that the promotional examination will be held in conjunction with the entrance examination. A court will not substitute its opinion or discretion for that of the administrative body. Cotter v. Wolff (1948), 88 Cal.App.2d 376.

It is therefore my conclusion that a new civil service class of trainee may be created in accordance with the appropriate Charter provisions and a promotional examination, in conjunction



Mr. George J. Grubb

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April 1, 1970

with an entrance examination, may be held from this position to the rank of H-2 Fireman.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





March 9, 1970

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William F. Murray, Chief  
San Francisco Fire Department  
260 Golden Gate Avenue  
San Francisco, California 94102

Re: Fire Department Permits on  
Port Commission Properties

Dear Chief Murray:

This replies to your letter of February 12, 1970, asking my opinion on these questions:

1. "Acting under Section 38 of the Charter of the City and County of San Francisco, does the Bureau of Fire Prevention and Public Safety of the San Francisco Fire Department have the right to demand that hazardous and other occupancies or businesses located on San Francisco Port Commission property be required to have Fire Department Permits and Licenses under which to conduct business, per Article 5 of the Fire Code? Particular reference is made to Flammable Liquid and Liquefied Petroleum Bulk Storage Plants.

2. "If the answer to the above question is in the affirmative, would the following be required by the Fire Department, as stipulated in the Fire Code: To request clearance from other City and County Departments having jurisdiction, as required by the San Francisco Fire Code, before the permit is issued?"

Answer to Question 1:

Yes, except insofar as the properties on which the businesses and occupancies referred to are located are used in connection with the management, government, control and administration of the harbor. This exception is dictated by Charter §48.2 which provides in part:

"All the powers and duties incident to the management, government, control and administration of said harbor and all properties and utilities used in connection therewith, shall be vested in the Port Commission of the City and County of San Francisco.

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William F. Murray

- 2 -

March 9, 1970

Charter §48.3 provides in part:

"The Port Commission shall have the power and duty to use, conduct, operate, maintain, manage, regulate, and control the Port Area of San Francisco and to do all things it deems necessary in connection with the use, conduct, operation, management, maintenance, regulation, improvement and control of said Port Area, or which may further the interests of the Port in world trade, including, without limiting the generality of the foregoing, the exclusive power to perform or accomplish the following:

"1. The improvement, operation and conduct of the harbor, and any and all improvements or facilities located thereon;

"2. The construction, reconstruction, repair, operation and use of all works, buildings, facilities, utilities, structures and appliances incidental, necessary or convenient for the promotion and accommodation of commerce and navigation, or located within the Port Area; . . . ."

In case of doubt as to whether any particular occupancy or business is so used in connection with the management, government, control and administration of the harbor as to prevent the exercise of your permit jurisdiction, you should take the matter up with the Port Commission. I know that it is totally dedicated to fire prevention, fire protection, fire-spread control, and the protection of persons and property from fire, as are you and your department, and that, even though a particular matter might fall outside your permit jurisdiction, it will make every effort to comply with your recommendations.

Answer to Question 2:

Yes, subject to the same exception.

Please advise if I can be of further assistance.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 19, 1970

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Mr. Joseph E. Tinney  
Assessor  
101 City Hall  
San Francisco, California 94102

Subject: Taxability of Materials Used on  
Construction Jobs, i.e., Inventory  
or Fixtures

Dear Mr. Tinney:

This is in response to your letter of February 24, 1970, wherein you solicit my comments as to various problems concerning the applicability of ad valorem taxes to personal property which on the lien date is in the possession of a contractor for eventual incorporation into a construction project owned by a tax exempt governmental agency.

At the outset, it should be noted that the Assessor has no discretion to exempt from ad valorem taxes property which, under the law, is taxable to the contractor. Accordingly, the question is whether the materials involved properly are considered the property of the contractor or rather the property of the tax exempt governmental agency.

Where the personal property involved is in the hands of a contractor for eventual use in a governmental construction project, the first question is whether such personal property is owned for tax purposes by the contractor or by the governmental agency.

In California the law is firmly established that the ordinary contract to furnish labor and materials in connection with a construction project is not a contract for the sale of goods but rather as a contract to improve real estate. Until the materials are affixed to the realty, no title passes and the materials remain the property of the contractor. Steiger Terra Cotta and Pottery Works v. City of Sonoma (1909), 9 C.A. 698; 100 Pac. 714; Aced v. Hobbs-Sesack Plumbing Co., 55 C.2d 573;



Mr. Joseph E. Tinney

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12 Cal.Rptr. 257; 360 P.2d 879. Vold, Law of Sales, pages 27 et seq. Title passes to the owner of the realty when the materials are affixed to and become an integral part of the realty. As stated in Vold, supra:

"Buildings erected on land ordinarily become a part of the real estate. In the performance of ordinary building contracts the contractor does not sell the building materials. The owner of the site does not buy them. Ownership of these materials passes by accession. This happens as and when in the process of construction they become integral parts of the building. The building belongs to the owner of the site as part of his real estate."

Hence, it is my opinion that, where the contract does not contain a title clause but rather is an ordinary contract to furnish labor and material, personal property in the hands of a contractor on the lien date for incorporation eventually into a governmental construction project is taxable to the contractor. After annexation to the realty, the materials should be regarded as tax exempt government property.

The question then arises whether a so-called "title clause" in the contract can affect the general rules for taxability set forth above.

There are several California cases that if the contract between the private contractor and the governmental entity specifies that title to construction materials vests in the governmental entity at some time prior to their annexation to the realty, then, subject to exceptions, the materials will be considered as owned by the governmental entity and exempt from ad valorem taxes.

The leading case is General Dynamics Corp. v. County of Los Angeles (1958), 51 C.2d 59; 330 P.2d 794. In that case plaintiff taxpayers were performing governmental research and production pursuant to contracts providing that title to all personal property passed to the United States at various specified times prior to the lien date. This personal property included (1) materials being fabricated into products to be delivered to the Armed Forces; (2) property held on a standby basis for use in the event of increased defense research or production; and (3) tools and equipment used in producing goods and carrying out

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Mr. Joseph E. Tinney

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research. The court held that these materials were exempt from ad valorem taxes on the theory that ownership for tax purposes, by reason of the title clauses in the contracts, was in the United States.

The court indicated (1) that a clause vesting title in a governmental entity ordinarily would be effective to exempt the materials from taxation unless the contractor retains the essential indicia of ownership, or the government's title is for security only; (2) that the right of a contractor to obtain an economic benefit from the use or possession of property, while not controlling, may be a relevant consideration in determining who is actually the owner for tax purposes; and (3) that each contract must be examined individually to determine whether the contractor retained rights in the property inconsistent with ownership by the governmental entity.

An earlier case, C. C. Moore and Co., Engineers v. Quinn (1957), 149 C.A.2d 666; 308 P.2d 781, held that component parts of a boiler plant being constructed by a contractor for a municipality were not taxable to the contractor, notwithstanding that on the lien date they were not yet permanently affixed to the realty, where such parts had been specifically manufactured for a particular job and were practically useless for any other, and where, under a reasonable interpretation of the construction contract, beneficial possession in complete control of the component parts had passed to the municipality and the contractor had no interest in them other than the obligation to assemble them.

The General Dynamics case also held that the concept of "possessory interest" cannot be used to tax personal property (as distinguished from real property) owned by a governmental entity but in the possession of a contractor for use in a governmental construction project. The court stated that although the right to obtain an economic benefit from the use or possession of tangible personalty may be relevant in determining its actual owner for tax purposes, California law simply does not provide for imposition of a possessory interest tax on personal property possessed by someone other than the person considered to be its owner for tax purposes.

In summary, it is my opinion that:

1. In the absence of a "title clause" in the construction contract materials in the hands of a contractor for use in a governmental construction project are taxable as follows:



Mr. Joseph E. Tinney

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March 19, 1970

(a) At all times prior to the time the materials are affixed to the realty, said materials should be regarded as personal property owned by and taxable to the contractor.

(b) At all times after the materials become affixed to the realty, said materials should be regarded as real property owned by the governmental entity owning the real estate. Such affixed materials, of course, are exempt from ad valorem taxes.

2. Where a "title clause" in the construction contract vests title in the governmental entity at some time prior to annexation, the personal property should be considered as owned by the governmental entity and exempt from ad valorem taxes unless it appears from an examination of the individual contract that the contractor retains the essential indicia of ownership or that the governmental title is for security only.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT OF THE PHYSICS DEPARTMENT

FOR THE YEAR 1954-1955

CHICAGO, ILLINOIS

1955

PHYSICS DEPARTMENT

March 30, 1970

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Mr. Irving G. Breyer  
Legal Adviser  
Board of Education  
135 Van Ness Avenue  
San Francisco, California 94102

Re: Board of Education Contract  
for Programming Services

Dear Mr. Breyer:

This replies to your letter of March 19, 1970, inquiring whether the making by the Board of Education of a contract, involving payments of not to exceed \$15,000 with Peat, Marwick, Mitchell & Company, without competitive bidding, for preparation of an operation's manual for the School District's planning, programming budget system, would violate Education Code §15951, which reads:

"The governing board of any school district shall let any contracts involving an expenditure of more than two thousand five hundred dollars (\$2,500) for work to be done or more than five thousand dollars (\$5,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise." (Emphasis added.)

Peat, Marwick, Mitchell & Company is, of course, a firm of certified public accountants. The authorities indicate that such a contract would be one for special services rather than "work," "materials" or "supplies," hence would not violate §15951. (Gov.C. §53060; Cobb v. Pasadena City Board of Education, 134 C.A.2d 93 (hr. den.) [contract with architect to prepare plans for school extension program]. See, also, Kennedy v. Ross, 28 C. 2d 560, 580-582 [contract with consulting engineer to prepare plans for sewage treatment plant]; 10 McQuillin, Municipal Corporations, 1966 Rev. Vol., §29.35, pp. 340-341; 15 A.L.R.3d 735.)



Mr. Irving G. Breyer

- 2 -

March 30, 1970

Government Code §53060 provides in material part:

"The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required."

Cobb, supra, states that this statute "removes all question of the necessity of advertising for bids for 'special services' by a person specially trained and experienced and competent to perform the special services required." (134 C.A.2d at 96.)

"Person," as defined in Government Code §17, "includes any person, firm, association, organization, partnership, business trust, corporation, or company."

"Special" services include those which are "out of the ordinary" by reason of their nature and the qualifications of persons capable of furnishing them. (Jaynes v. Stockton, 193 C.A. 2d 47, 51-52.)

In my opinion a contract of the kind described in your letter would fall within the category of one for special services in financial, economic, accounting or administrative matters with a person specially trained, experienced and competent to perform the services, and would not have to be let out to bid.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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April 6, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Board of Education; Validity of  
Proposal to Elect Certain Members  
Thereof By District and Certain  
Members at Large

Dear Mr. Dolan:

This is in response to a request of the Legislative and Personnel Committee for advice as to the constitutionality of a suggestion that in its consideration of proposals relating to an elective school board, the Committee consider the possibility of creating an elective school board to which some of the members would be elected by district and the remaining members would be elected at large.

I have since been advised that the constitutional question involves the possible application of the "one man, one vote" principle enunciated by the United States Supreme Court in Gray v. Sanders (1963), 372 US 368, 9 L ed 2d 821, 83 S Ct 801, and recently extended by said court so as to include an election of trustees of a local school district. (Hadley v. Junior College Dist. of Metro. Kansas City, Mo. (1970), 90 S Ct 791.)

In the Hadley case, supra, applicable provisions of state law authorized separate school districts by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district. The trustees were to be apportioned among the separate school districts comprising the consolidated district on the basis of "school enumeration," i.e., the number of persons between the ages of 6 and 20 years who reside in each district. If no one or more of the component school districts had 33-1/3% or more of the total enumeration of the consolidated district, then all six trustees would be elected at large. If one or more district had between 33-1/3% and 50% of the total enumeration, each such district



Mr. Robert J. Dolan, Clerk

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would elect two trustees and the rest would be elected at large from the remaining districts. If one district had between 50% and 66-2/3% of the total enumeration, it would elect three trustees, and if one district had more than 66-2/3%, it would elect four trustees.

After finding that the "one man, one vote" principle is applicable to an election of trustees of a local school district, the court then went on to find the statutory formula in this case to be violative of said principle, as follows:

"Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33-1/3%, 50% or 66-2/3% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitled that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case." (90 S Ct 791, pp. 795-796.)

Accordingly, it is my opinion that a proposal calling for the creation of an elective school board to which some of the members would be elected by district and the balance elected at large would not be violative of the "one man, one vote" principle, provided that the apportionment formula for the election of the district members guarantees that "each district . . . be established on a basis which will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." (Hadley v. Junior College Dist. of Metro. Kansas City, Mo., *supra*, p. 795.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 10, 1970

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Mr. James K. Carr, General Manager  
Public Utilities Commission  
287 City Hall  
San Francisco, California 94102

Subject: Financing of \$46,000,000 Municipal  
Railway Improvement Program - Legality  
of Nonprofit Corporation Method of  
Financing

Dear Mr. Carr:

This is in response to your letter of March 19, 1970, requesting an opinion as to the legality of the nonprofit corporation method of financing the proposed \$46,000,000 Municipal Railway improvement program.

As indicated in your letter, the proposed improvement program would be financed by the expansion of the program now under way through the San Francisco Municipal Railway Improvement Corporation (hereinafter referred to as the Corporation), a nonprofit corporation formed for the sole purpose of providing real or personal property reasonably necessary for the operation of a public mass transportation system for the City and County of San Francisco (Art. III, Articles of Incorporation, San Francisco Municipal Railway Improvement Corporation).

It is assumed that the financing of the improvement program by the Corporation will be essentially as follows:

The Corporation would enter into an agreement with the City whereby

(a) with respect to properties not presently owned by the City, Corporation would agree to

(1) acquire real property and cause improvements to be made thereon on a competitive bid basis in strict accordance with City's specifications, or in the

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Mr. James K. Carr

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case of personal property to purchase same on a competitive bid basis in strict accordance with City's specifications, and

(2) lease said property so acquired or purchased to the City for a fixed term at an annual rental equal to, but in no event exceeding, the fair market value of the use of the property for each year of the term of the lease. Upon termination of the lease title to the property would vest in the City; and

(b) with respect to properties presently owned by the City, Corporation would agree to

(1) lease certain real and personal property from the City,

(2) cause improvements to be made thereon or thereto on a competitive bid basis and in strict accordance with City's specifications, and

(3) lease back to the City said properties and improvements for a fixed term at an annual rental equal to, but in no event exceeding, the fair market value of the use of the properties for each year of the term of the lease.

By Letter Opinion No. 67-93-A, dated December 11, 1967, you were advised that the proposed method of financing the acquisition of Municipal Railway rolling stock through a lease arrangement with a nonprofit corporation was legally feasible. By supplemental Letter Opinion No. 69-22, dated February 25, 1969, you were further advised that under said proposed lease arrangement the periodic rental payments did not constitute a capital cost within the meaning of Charter Section 74. Based on the foregoing it is my opinion that, with respect to properties not presently owned by the City, the proposed method of financing through a lease arrangement with San Francisco Municipal Railway Improvement Corporation is legally feasible subject, however, to the following procedures. Leases of real property must be negotiated through the Director of Property (Admin. Code, §§ 23.1 and 23.18) and executed by the Mayor and the Clerk of the Board of Supervisors, pursuant to a resolution adopted by the Board (Admin. Code, § 23.20). Contracts for leasing of personal property must be awarded by the Purchaser of Supplies (Charter § 88) but such







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an award to a nonprofit corporation can be made without competitive bidding (Admin. Code, § 21.18.3).

With respect to improvements to properties which are presently owned by the City and are now being used for public utility purposes, the proposed financing thereof would require as part of the transaction that said property be leased from the City to the Corporation. Section 123 of the Charter entitled "Referendum on Any Lease or Sale of Public Utility Property," provides as follows:

"The board of supervisors shall have power to lease or sell any public utility or any part thereof; provided that any ordinance or other measure involving the lease or sale of any public utility or part thereof, except as provided in sections 92 and 93 of this charter, or any ordinance granting any new franchise for the operation of any public utility whose franchise has expired, or is about to expire, must be referred and submitted to a vote of the electors of the city and county at the election next ensuing not less than sixty days after the adoption of such ordinance, and shall not go into effect until ratified by a majority of the voters voting thereon."

The question thus presented is whether the aforesaid restriction on leases of public utility property is applicable to leases which are part of a leaseback arrangement, wherein the lease is made for the sole purpose of permitting improvements to be made to the property and, by virtue of the leaseback made concurrently with the lease, the City is not divested of the right to manage, operate or control the property.

It is a general rule of statutory construction that the literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the enacting body and if the words are sufficiently flexible to admit of a construction which will effectuate that intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act. (2 Sutherland, Statutory Construction 339.) The fundamental rule of statutory construction is that the court should ascertain the intent of the enacting body so as to effectuate the purpose of the law. (Select Base Materials v. Board of Equalization, 51 Cal 2d 640.)

C. 21

Dear Sir,  
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above matter.

I am sorry to hear that you are not satisfied with the result of the examination. I have been very careful to see that all the necessary precautions were taken, and I am confident that the result is correct.

I am sure that you will be satisfied with the result of the examination, and I am confident that the result is correct.

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Applying the aforesaid rules of statutory construction we must first look to other sections of the Charter to determine, if possible, the apparent intention of the Charter framers and electorate in enacting Section 123.

Section 119 of the Charter enacted at the same time as Section 123 as part of the new charter, which was adopted March 26, 1931, sheds a great deal of light on the question of intent. It reads, in part, as follows:

"Section 119. Public Utility Policy

"It is the declared purpose and intention of the people of the city and county, when public interest and necessity demand, that public utilities shall be gradually acquired and ultimately owned by the city and county. . . ."

By virtue of Section 119 the City is committed to a general policy of ownership of all public utilities. (San Francisco v. United States (1939) 106 Fed 2d 569.)

With respect to public utilities already owned or acquired by the City, it is clear that any sale or lease of such public utility or part thereof which substantially divests the City of the right to manage, operate or control same would be in direct conflict with the general policy of gradual acquisition and ultimate ownership of all public utilities as expressed in Section 119. It was, therefore, both logical and prudent that the Charter should contain a provision that any act in derogation of said general policy should require approval, not only of the Board of Supervisors, but of the electorate as well.

That this was the intention of the charter framers and the electorate in enacting Section 123 is supported by the legislative history of Sections 92 and 93 of the Charter. Said sections contain provisions relative to the sale and leasing of public utility real property which, by virtue of the express language of Section 123, are not subject to the restriction therein.

Section 92 provides in part that "Any real property may be sold on the recommendation of the . . . commission in charge of the department responsible for the administration of such property. When the board of supervisors, by ordinance, may authorize such sale and determine that the public interest or necessity



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demands, or will not be inconvenienced by such sale, the director of property shall make a preliminary appraisal of the value of such property. . . . The supervisors may authorize the acceptance of the highest and best tender, or they may, by ordinance, direct that such property be sold at public auction. . . . The director of property may, in lieu of sale, arrange for the trading of any real property proposed to be sold for other property required by the department in charge thereof, on the recommendation of the . . . commission in charge of such property and the authorization, by ordinance, of the board of supervisors." In brief, Section 92, when read together with Sections 119 and 123 provides that when the Board of Supervisors has determined that public interest or necessity demands or will not be inconvenienced thereby, i.e., when it is not required for the purposes of operating the public utility, the property may be sold or exchanged free of the restrictive provision of Section 123.

At the time the new Charter was adopted in 1931, Section 93, dealing with leases of City property, provided, in part, as follows:

"When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purpose of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years to the highest responsible bidder at the highest monthly rental . . .

"The public utilities commission may provide, by resolution, that agricultural lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural purposes shall be subject to lease and administration by the operating forces of the department; provided, however, that no such lease shall be made to any other public utility without the approval of the board of supervisors by two-thirds vote thereof."

In brief, Section 93, before it was amended and when read together with Section 123, provided that leases of surplus public utility lands for 20 years when authorized by ordinance of the Board of Supervisors and Water Department lands for agricultural purposes when authorized by the Public Utilities Commission were





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not subject to the restrictive provision of Section 123, provided, however, that leases of Water Department land to another public utility could not be made without approval of a two-thirds vote of the Board of Supervisors.

In 1946, Section 93 was amended by adding the following provision relating to the leasing of airport lands:

" . . . and further, the public utilities commission may provide, by resolution, that lands now devoted to airport purposes, may be leased or rented for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission. . . ."

In brief, the 1946 amendment, when read together with Section 123, provided that leases of airport lands for a period not to exceed forty years when authorized by resolution of the Public Utilities Commission were likewise not subject to the restriction of Section 123, provided, however, that leases of airport land to another public utility could not be made without approval of a two-thirds vote of the Board of Supervisors.

In 1959 Section 93 was again amended and now reads, in part, as follows:

"The public utilities commission shall have exclusive power to lease agricultural or other lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural or other purposes and such leases shall be subject to administration by the operating forces of the water department.

"The public utilities commission shall have exclusive power to lease lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, subject to the approval of the public utilities commission, and thereafter the administration of any and all such leases shall be by the





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public utilities commission. Section 123 of this charter shall not be applicable to leases referred to in this paragraph, provided, however, that no lease of airport lands or agreement which divests the city and county of the right to manage, operate or control the aircraft landing field, the entire part of the airport not devoted to the aircraft landing field, or the entire airport shall be made without the approval of the board of supervisors by ordinance and referral and submission to a vote of the electors of the city and county at the election next ensuing not less than sixty days after the adoption of said ordinance, and such ordinance shall not go into effect until ratified by a majority of voters voting thereon." (Emphasis added.)

Said amendment appeared as Proposition L on the ballot. The ballot argument in support of Proposition L stated:

"Proposition L clarifies Section 93 of the Charter by spelling out the authority of the Public Utilities Commission to negotiate and execute certain land leases at the San Francisco International Airport.

"The City Attorney has ruled that Section 93 grants exclusive authority to the Public Utilities Commission respecting the execution of land leases to airline companies. This ruling has been challenged due to alleged ambiguity in certain language of the section. The charter amendment is designed to settle the matter by providing clearly that the Public Utilities Commission has exclusive authority to negotiate and execute leases of airport lands to airline companies.

"In addition the charter amendment provides that any proposed lease which would divest the City and County of the management, control or operation of the entire airport or substantial portions thereof must receive the approval not only of the Public Utilities Commission and the Board of Supervisors but also of the voters of San Francisco."

Exclusive power to lease airport lands is repugnant to the requirement that such leases be approved by the Board of Supervisors and the electorate, as provided in Section 123. Hence,

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under the rules of statutory construction such restriction contained in Section 123 would not be applicable, in the absence of express language to the contrary. The statement that "Section 123 shall not be applicable to leases referred to in this paragraph . . ." therefore appears to be superfluous. There is, however, another rule of statutory construction that effect must be given if possible to every word, clause or sentence of a statute and the statute should be construed so that effect is given to all provisions, so that no part will be inoperative or superfluous. (2 Sutherland, Statutory Construction 339.) When read together with the proviso which follows, to wit: "provided that no lease which divests the city and county of the right to manage, operate or control . . . shall be made without approval of the board of supervisors by ordinance and referral and submission to a vote of the electors . . .," the reference to Section 123 can be given effect if it is construed to mean that Section 123 shall be applicable in the event any such lease divests the city and county of the right to manage, operate or control the aircraft landing field, or the entire part of the airport not devoted to the aircraft landing field or the entire airport. Thus construed, the aforesaid restriction on the exclusive power of the Public Utilities Commission to lease airport lands, when viewed in the light of the general policy expressed in Section 119 and the legislative history of Sections 92 and 93 indicates the type of lease the charter framers and the electorate had in mind when 123 was enacted.

Based on the foregoing rules of statutory construction, analysis of the purpose of the restriction in Section 123 of the Charter and review of the legislative history of Sections 92 and 93, it is my opinion that the safeguard requirement of voter approval was intended to apply only to (1) a sale or lease of an entire public utility or (2) a sale or lease divesting the City of the right to operate, manage or control any part thereof which is necessary to the continued operation of said utility. For the reasons thus stated, it is my opinion that Section 123 of the Charter is not applicable to the special type of lease which is part and parcel of a leaseback arrangement, and which does not divest the City of the right to manage, operate or control the particular utility property which is the subject of said lease.

It would therefore appear that, with respect to properties presently owned by the City, the proposed method of financing through a lease-leaseback arrangement with the San Francisco Municipal Railway Improvement Corporation is legally permissible, subject, however, to the following procedures:



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(1) Leases of real and personal property. The property is to be leased for the sole purpose of improving same and leasing it back to the City for use by the Municipal Railway. It is not "surplus" property. Section 93 of the Charter, which limits leases of City real property to 20 years and requires competitive bidding, deals only with "surplus" property (Larsen v. City and County of San Francisco, 152 Cal App 2d 355, 366) and therefore is not applicable to this type of lease. Since the Charter does not otherwise restrict, and is silent as to the procedure for, leasing utilities property used for Municipal Railway purposes, the Board of Supervisors, under the residual powers granted by Section 9 of the Charter, may, by ordinance, prescribe the procedure for leasing such property, both real and personal.

(2) Leasebacks of City owned real property. Leasebacks must be negotiated through the Director of Property (Admin. Code, §§ 23.1 and 23.18) and executed by the Mayor and the Clerk of the Board of Supervisors, pursuant to a resolution adopted by the Board (Admin. Code, § 23.20).

(3) Contracts for the leaseback of City owned personal property. Such contracts must be awarded by the Purchaser of Supplies (Charter § 88), but such an award to a nonprofit corporation can be made without competitive bidding (Admin. Code § 21.18.3).

In order to utilize the nonprofit corporation method of financing, it is necessary that there be a lease from the corporation to the City, either of real or personal property. It is apparent that some parts of the proposed improvement program do not lend themselves to this type of financing because, by their very nature, there can be no such lease involved. Among items falling into this category are such improvements as track removal, exclusive of replacement, and street resurfacing.

In summary, I am of the opinion that, except as noted in the previous paragraph, the method of financing the Municipal Railway improvement program through expansion of the San Francisco Municipal Railway Improvement Corporation program now under way is legally feasible.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 14, 1970

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Mr. S. M. Tatarian  
Director of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Roadway of The Embarcadero to be  
Maintained with Port Funds

Dear Mr. Tatarian:

This is in response to your April 7, 1970 letter inquiring as to whether the maintenance of the roadway of The Embarcadero should be financed with gas tax funds or with Port funds.

The thoroughfare known as The Embarcadero was provided for under state law which required that it have a roadway of 180 feet and a sidewalk on its inner side of 20 feet in width (Sections 3130 and 3131, Harbors and Navigation Code). The law further provided that the roadway should be constructed and kept in repair by the San Francisco Port Authority and that the sidewalk should be constructed and kept in repair in the manner provided by law for the construction and repair of sidewalks on other streets of San Francisco (Section 3131).

When the Port was transferred from the State of California to the City and County of San Francisco jurisdiction and control over the roadway of The Embarcadero was transferred to and vested in the San Francisco Port Commission as successors to the San Francisco Port Authority of the state and they also assumed the responsibility for maintenance and repair of the roadway with Port funds (Sections 48.2, 48.3 and 48.4 of the Charter; Section 6 of the Port Transfer Agreement). Section 48.4 of the Charter provides that the revenues of the harbor shall be deposited in special harbor funds and that "appropriations from such funds shall be made for the following purposes and in the order named, viz.: . . . (c) for repairs and maintenance of the properties of said harbor or used in connection with the operation thereof; . . . "





Mr. S. M. Tatarian

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April 14, 1970

You are accordingly advised that the maintenance of the roadway of The Embarcadero should be financed with Port funds.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 14, 1970

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Mr. Virgil L. Elliott, Director  
Department of Finance and Records  
170 City Hall  
San Francisco, California 94102

Subject: Duty of Candidates and Political  
Committees to File Campaign State-  
ments Under Government Code  
§§ 3750-3754

Dear Mr. Elliott:

On April 10, 1970, I advised all City and County officers, boards and commissions of the decision in City of Carmel v. Young, Supreme Court No. S.F. 22728, wherein the court held that, with respect to the requirement that public officers file a statement of their financial interests (Gov. Code, §§ 3600-3704) "the statute is unconstitutional in its entirety."

Some questions have been raised as to the effect of this decision upon the provisions of Sections 3750-3754 of the Government Code relating to political contributions, inasmuch as these sections were enacted at the same time as Sections 3600-3704 and were a part of the same statute.

A reading of the decision of Mr. Justice Burke, who wrote the majority opinion in the subject case, indicates, in my opinion, that Sections 3750-3754 are not affected by said decision and accordingly, it will still be incumbent upon persons subject to the provisions of said sections to comply therewith.

In brief, Sections 3750-3754 of the Government Code provide that each candidate for state or local public office, and each political committee supporting such candidate, shall file, as a public record, two cumulative statements, one between 20 and 25 days prior to the election and the other between 30 and 35 days after the election, naming each person or organization from whom a contribution or contributions have been received that



Mr. Virgil L. Elliott

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April 14, 1970

total more than \$500 and that have been or may be expended on behalf of his campaign, together with the specific amounts contributed by each person or organization.

Candidates for state offices must file their statements with the Secretary of State and candidates for local offices must file their statements with the County Clerk.

The statement after the election may be combined with a campaign statement as defined in Section 11503 of the Elections Code.

The terms "contribution," "expenditure," "political committee" and "candidate" as used in Sections 3750-3754 are defined in Section 3753.

Violation of a provision of the sections is a misdemeanor, and any violation with knowledge of the unlawfulness of such violation is a felony.

Legislation amending (A.B. 430, S.B. 274) or repealing (A.B. 1415) Sections 3750-3754 of the Government Code has been introduced in the current session of the State Legislature, but it is my understanding that their consideration is being held up pending a study of changes which may be necessary or advisable in the light of the decision in the Carmel case with respect to the financial disclosure aspects of the proposed legislation.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 11, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California

Subject: Charter Section 130; Time Limitations  
for Action by Board of Supervisors on  
Fare Schedules for Municipal Railway

Dear Mr. Dolan:

In answer to your letter of May 5, 1970, regarding the above subject, you are herewith advised that the Board of Supervisors, pursuant to the provisions of Charter Section 130, is not limited by the 30-day action provision found in the last sentence of that section.

This conclusion is based upon the fact that the proposed fare schedule in question relates to the Municipal Railway, a deficit utility. The 30-day provision of Section 130 is applicable only in the instance where proposed rates, fares and charges have been submitted by the Public Utilities Commission to the Board respecting a non-deficit utility.

Should you need further advice upon this matter, please do not hesitate to call or write.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 20, 1970

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Mr. Harry Albert  
Assistant General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Circumstances Necessary to Invoke an  
Estoppel Against City and Deny Its  
Recovery of Erroneously Paid Excess  
Salary

Dear Mr. Albert:

This is in response to your letter requesting my opinion concerning the salary rights of Mr. Theodore J. Bauer, 9219 Airfield Safety Officer. The staff report to the Civil Service Commission, dated February 4, 1970, details the factual situation, which I assume is not in dispute. The facts are quoted as follows from the above mentioned staff report:

"Mr. Bauer was certified permanent civil service 9210 Airport Security Officer on October 14, 1961 and was receiving the maximum compensation in this class - \$795. On March 1, 1969, he was appointed permanent limited tenure 9211 Airport Police Sergeant at \$876. When he was laid off on July 31, 1969, he was receiving \$919 (rate effective 7-1-69), and had only four months service in this class. He was then returned to his regular civil service class of 9210 Airport Security Officer at the maximum rate of \$834 (rate effective 7-1-69).

"On August 20, 1969, Mr. Bauer was certified permanent civil service 9212 Airfield Safety Officer at the maximum rate of \$941 per month. This rate was in error and he should have been paid \$896, which represents the so-called 'double jump' over the maximum of the class from which he was promoted, i.e., 9210 Airport Security Officer.



Mr. Harry Albert

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April 20, 1970

"The two ranges as of July 1, 1969 are as follows:

"9210

686	721	757	795	<u>834</u>
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"9212

775	813	854	<u>896</u>	941"
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Mr. Bauer obtained a hearing of his matter before the Civil Service Commission and the Commission directed that the Controller be advised to stop the collection of the overpayment and return any amounts which were already collected as overpayments. Mr. Bauer had been paid the maximum rate in the compensation schedule (\$941) for Class 9212 Airfield Safety Officer, from the date of his appointment on August 20, 1969, to December 31, 1969, at which time his salary was changed to the fourth step in the range (\$896). The second action of the Commission was to establish the salary for Mr. Bauer at the fourth step in the salary schedule (\$896) as of the date of the Commission action, March 30, 1970.

Based upon the facts as stated above, one of the Civil Service Commissioners abstained from voting in both actions and now seeks an answer to the following questions:

"1. If a city employee was offered a position at a salary higher than that provided for by the Salary Standardization Ordinance, and if the employee relied on the statement of the agent of the City and County as to the salary proffered, then does the City and County have a duty and an obligation to continue to pay such salary rate?

"2. Does the above recitation and the information contained in the enclosures [referring to the matter of Mr. Theodore J. Bauer] establish a condition that would estop the City from recovery of salary over-payments?"

It is clear that an error was in fact made. Under the appropriation provision of the Salary Standardization Ordinance (Section VII(A)) Mr. Bauer was placed in a step higher than he should have been placed in the 9212 salary range. When the error was discovered, Mr. Bauer was placed in the correct step of his range on December 31, 1969.

The answer to both questions depends on the applicability of the doctrine of estoppel based upon the facts and



Mr. Harry Albert

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April 20, 1970

circumstances of the particular matter. The Court of Appeals case of Shoban v. Board of Trustees of Desert Center Unified School District (1969), 81 Cal.Rptr. 112, held that subject to the qualifications that estoppel may not be invoked where to do so would be harmful to some specific public policy or public interest, or where it would enlarge the power of a governmental agency or expand the authority of a public official, estoppel may be invoked against a governmental agency where justice and right require it. The Shoban case also sets forth the elements which must be present to invoke an estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

This office has issued two opinions in the past year relating to the question of estoppel against the City in overpayment cases. In the first Opinion No. 69-27, dated February 10, 1969, it was concluded that in the absence of unusual circumstances, an estoppel will not be invoked against a municipality. This opinion was partially based upon Aebli v. Board of Education (1944), 62 Cal.App.2d 706, which specifically held that "rare and unusual circumstances" must exist to invoke estoppel against the City. The Shoban case, *supra*, which was decided after Opinion No. 69-27 was written, eliminates the "rare and unusual circumstances" condition and concludes that the government is the same as any other legal entity with respect to estoppel. In the second Opinion No. 69-60, dated June 3, 1969, it was concluded that an error which placed an employee in a higher step than the Salary Standardization Ordinance provided for was not sufficient to invoke estoppel because the subject to that opinion did not change his position to this detriment. Opinion No. 69-60 is supported by Aebli v. Board of Education, supra.

The court in the Shoban case did not overrule the Aebli decision but distinguished it. The Aebli decision is still the law in California and covers the present situation.

As I interpret the facts of the Bauer matter now before the Commission, there was a purely mechanical error on the part of the employees of the Civil Service staff which resulted in an overpayment to Mr. Bauer due to the fact that he was placed in a higher step than he should have been. He was promoted from a step paying \$834 per month to a step paying \$941 per month, whereas he should have been placed in the step paying \$896 per month. I must therefore conclude, as I did in Opinion No. 69-60, that Mr. Bauer did



Mr. Harry Albert

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April 20, 1970

not change positions to his detriment and therefore the doctrine of estoppel would not apply to his case.

Based upon the facts and circumstances of the Bauer case, the City has no obligation to continue him at the higher salary rate and the City is not estopped from recovery of the overpayments of salary.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney







April 23, 1970

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PUBLIC LIBRARY

Mr. Robert J. Dolan  
Clerk of the Board  
235 City Hall  
San Francisco, California 94102

Subject: Limitation on Amount of Funds Appropriated  
for Police Intelligence Unit

Dear Mr. Dolan:

You have asked on behalf of Supervisor Francois whether there is any limitation on the amount of money which may be appropriated by the Board of Supervisors for the operation of the Police Intelligence Unit in the investigation and detection of crime and related functions of the Unit.

Under Section 35.8 of the Charter, the Board of Supervisors has the authority to appropriate annually up to \$25,000.00 to the Contingent Fund of the Chief of Police, which sum may be used by him in his discretion in the investigation and detection of crime.

Similarly, by virtue of Section 38.8.1 of the Charter, the Board of Supervisors may appropriate up to \$25,000.00 annually to the Narcotic Fund of the Chief of Police. This fund also may be spent in the Chief's discretion for the enforcement of narcotic laws.

As there is no provision in the Charter authorizing the Board of Supervisors to appropriate money to any special fund for the Police Intelligence Unit to be spent in the discretion of the Chief of Police in carrying out the functions of the Unit, the Board of Supervisors, therefore, cannot create a special fund by appropriation for the Police Intelligence Unit. However, this does not restrict the Chief of Police from expending sums for the Police Intelligence Unit from the two special funds he has where the Police Intelligence Unit is engaged in the investigation and detection of crime or in the enforcement of narcotic laws.



Mr. Robert J. Dolan

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April 23, 1970

Even though the Board of Supervisors may not create a special fund for the Police Intelligence Unit, the Board may appropriate funds, in unlimited amount for the operation of the Police Intelligence Unit subject to the budget and fiscal provisions of the Charter as is done with respect to the Police Department generally.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 24, 1970

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Mr. Wallace Wortman  
Director of Property  
Real Estate Department  
450 McAllister Street  
San Francisco, California 94102

Subject: Maritime State Historic Park  
Haslett Warehouse  
Victorian Park  
Ptn. of Hyde Street Pier

Dear Mr. Wortman:

This will acknowledge receipt of your letter of March 19, 1970, wherein you enclosed a copy of Resolution No. 880-69 of our Board of Supervisors declaring it the policy of the Board to support the transfer in fee of Haslett Warehouse and other properties in the State Historic Maritime Park to the City and County at such time as proposals for the development of the properties in the Park will guarantee that no economic loss to the City and County will occur as a result of said transfer in fee, and in which resolution you are appointed as the official agent of the City to enter into negotiations toward this end.

You state that the most advantageous approach would be to enter into a long term lease with an operator/developer who would be responsible for the entire project, but you state that this presents three legal problems upon which you seek my advice, as follows:

1. Since the property is to be developed with the cooperation of the Recreation and Park Commission, would the possible commercial development be in conflict with Section 42 of the City Charter that provides that the Commission shall not lease except for recreation purposes.
2. The Haslett Warehouse portion of the project is presently rented to Haslett Company who together



Mr. Wallace Wortman

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April 24, 1970

with Abbot-Western have developed two of the four floors into office area and have expressed their desire to remain in occupancy and complete development of the building. Could the City enter into a lease with the present developer or any other developer without public bids as set forth in Section 93 of the Charter.

3. What would be the longest lease that could be granted by the City under Section 93.1 of the Charter and what problems might be involved under the referendum provisions of this Section.

I shall undertake to answer your inquiries seriatim.

1. While the Recreation and Park Commission could be consulted by you in your negotiations concerning the properties in question, the properties should not be put under the control, management or charge of the Recreation and Park Commission, as Sections 42 and 42.2 of our Charter (with reference to property under the control, management and direction of the Recreation and Park Commission) do not permit of their leasing of their properties for other than recreational purposes with the exception of stadiums or recreation fields as set forth in Section 42.3 and underground garages as set forth in Section 42.2 and which exceptions would not cover anything like the Haslett Warehouse.
2. Any lease with the present developer or any other developer would have to be made through public bids, as set forth in Section 93 of the Charter.
3. Under the provisions of Section 93.1 of the Charter and Ordinance #412-69 enacted pursuant thereto, the longest term permitted thereunder for a lease of surplus property (which this would involve) is 50 years.

However, the Board of Supervisors could pass an ordinance authorizing a lease for a term in excess of 50 years but not in excess of 99 years; were such a procedure adopted, the ordinance authorizing such a





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lease would be subject to the referendum provisions of Section 179 of the Charter. In essence, it would mean that such an ordinance would not become effective until 30 days after its passage (see Section 16 of the Charter) and, if during this 30-day period a petition were filed with the Board of Supervisors signed by the necessary number of qualified voters seeking a referendum, then the ordinance would not go into effect or become operative unless and until a majority of the qualified electors voting thereon shall vote in favor thereof (see Section 179 of the Charter).

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 24, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Agreement to Restrict Height of a  
Building as a Condition of  
Reclassification

Dear Mr. Dolan:

This is in response to your request for the preparation of a legally binding memorandum of agreement which would restrict an applicant for a zone change or any successor in interest there-to to the construction of a building having a maximum height of four stories. A memorandum of agreement has not been prepared since such an agreement would be illegal and against public policy.

An agreement of this type would be a conditional amendment to the City Planning Code or a rezoning on condition since such rezoning on condition has been defined as follows:

"Contract zoning, a conditional amendment, or rezoning on condition, occurs when a zoning authority [i.e., the Board of Supervisors] reclassifies land to a less restricted use, while the applicant for rezoning agrees to special restrictions on the use of the rezoned property which are not imposed upon other land included in the same classification." (See "The Use and Abuse of Contract Zoning," 12 UCLA Law Review 897, 898.)

In Griffin v. Marin (1958), 157 Cal.App.2d 507, 514, the court stated that "the police power to zone property may not be limited by private agreement. . . . Nor can the board properly show that the ordinance was conditioned upon a secret agreement with the property owner. Such an agreement would be illegal and against public policy." The Griffin case indicates that the



Mr. Robert J. Dolan

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April 24, 1970

community may not exercise its police power by contract or agreement, whether secret or not.

In Acker v. Baldwin, 18 Cal.2d 341, 345, the court stated in specific terms that the police power cannot be limited by private contract.

The amendment of a legislative act is itself a legislative act. Rezoning of use districts of changes of uses and restrictions within the district can be accomplished only through an amendment of a zoning ordinance and the amendment must be made in the same mode as its original enactment (Johnston v. City of Claremont, 49 Cal.2d 826, 835, 837-838; Blotter v. Farrell, 42 Cal.2d 804, 811; 8 McQuillin, "Municipal Corporations" (3rd Ed. Rev. 1957), Zoning, sec. 25.245, p. 594).

You are accordingly advised it is my opinion that the Board of Supervisors does not have the power to enter into such an agreement and that such an agreement if executed would be void and unenforceable.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 27, 1970

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Mr. Curtis E. Green  
Director, Bureau of  
Personnel and Safety  
901 Presidio Avenue  
San Francisco, California 94115

Subject: Payment of Supplemental Compensation  
to Municipal Railway Operators Who  
Are Receiving Payments of Permanent  
Disability Indemnity

Dear Mr. Green:

This is in response to your letter dated April 13, 1970, inquiring whether a Municipal Railway operator receiving payments of permanent disability indemnity under the provisions of workmen's compensation law is also entitled to receive supplemental compensation.

As you know, entitlement to supplemental compensation is governed by the provisions of Section 8.80.3.15 of the Annual Salary Ordinance, which provide in part as follows:

"An operator incapacitated for any kind of available work as a result of accidental injury sustained in the course of his employment will be allowed for such period or periods during such incapacity as may be determined, as hereinafter provided, the full amount which he would have earned during such period or periods had he been working according to regular schedule and at the regular rate of pay which he had and was receiving prior to the period of incapacity, less the amount of any workmen's compensation payable to him under the provisions of the workmen's compensation law. . . ."

For purposes of the workmen's compensation law of the State of California, disability caused by industrial injury is denominated as either temporary or permanent. Temporary disability is physical incapacity which is reasonably expected to be





Mr. Curtis E. Green

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April 27, 1970

completely cured or materially improved with proper medical attention. Permanent disability, on the other hand, is any impairment of bodily or mental function which remains after maximum recovery has been attained from the effects of the injury and which causes impairment of earning capacity, impairment of normal use of a member or a competitive handicap in the open labor market. (2 Hanna, Calif. Law of Employment Injuries and Workmen's Compensation, §§ 13.01 and 14.01.)

You will note that Section 8.80.3.15 provides for the payment of supplemental compensation to an operator whenever he is "incapacitated for any kind of available work." Section 8.80.3.15 does not relate entitlement to supplemental compensation to temporary or permanent disability as those terms are used in workmen's compensation law; rather, such entitlement is dependent only upon the existence of incapacity "for any kind of available work."

Thus, in determining whether an operator is entitled to supplemental compensation, it is immaterial whether he is receiving payments for temporary or permanent disability under the workmen's compensation law. For purposes of Section 8.80.3.15, the test is whether the operator is "incapacitated for any kind of available work."

An operator may in fact be "incapacitated for any kind of available work" regardless of the nature of the payments which he is receiving pursuant to the workmen's compensation law. Therefore, if an operator who is receiving payments of permanent disability indemnity is determined, in accordance with the provisions of Section 8.80.3.15, to be "incapacitated for any kind of available work" as a result of an industrial injury, he is entitled to receive supplemental compensation.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

CONFIDENTIAL

MEMORANDUM FOR THE DIRECTOR

DATE: 10/10/50

Subject: [Illegible]

[Illegible text]

[Illegible text]

[Illegible text]

[Illegible text]

Very truly yours,

[Illegible signature]

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May 12, 1970

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Mr. Raymond G. Connors, Jr.  
Secretary  
San Francisco Fire Commission  
260 Golden Gate Avenue  
San Francisco, California 94102

Subject: Port Fireboat Service--Payment of  
Increased Costs

Dear Mr. Connors:

This refers to your letter of February 10, 1970, inquiring whether Section 1908 of the Harbors and Navigation Code governs the amount payable by the City and County of San Francisco for Port fireboat service.

It appears that Section 1908 no longer applies to fireboat service provided for the protection of the Port of San Francisco inasmuch as Section 1908, originally enacted in 1937 and last amended in 1966, refers to the San Francisco Port Authority as part of State Government (cf. Harb. & Nav. Code §§1690 and 1700) and further refers to a \$350,000 expenditure limit under terms of a contract for fireboat service between the "authority" as a separate state agency and the City of San Francisco. (Cf. Harb. & Nav. Code §1908.)

You may note that the Port of San Francisco is no longer a state agency. It is now an agency of the City and County of San Francisco having complete Charter authority vested in its commission to manage, operate and maintain the Port. Such authority includes the power to do all things necessary to carry out the general powers. (Stats. 1968, ch. 1333, §§3, 11 and 12.) The cost of fire protection service necessarily falls within the foregoing powers.

The only limitation placed upon the expense of fire protection service exists at Section VI, page 16, paragraph 7 of the Port Transfer Agreement of January 24, 1969, which provides that there shall be no new or additional fire protection services



Mr. Raymond G. Connors, Jr.      2

May 12, 1970

to be paid for out of Port funds. Notwithstanding such limitation and assuming that the increased fireboat service cost for fiscal year 1969-70 is simply the result of increases in maintaining the present service, it appears that the increased cost must be paid for by Port funds. There is no need to amend Section 1903 of the Harbors and Navigation Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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May 13, 1970

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Mr. Nathan B. Cooper  
Controller  
109 City Hall  
San Francisco, California 94102

Subject: Recruitment of a Policeman as  
Meritorious Service Under  
Charter Section 35.11

Dear Mr. Cooper:

This letter is in response to your inquiry of May 8, 1970, in which you request my opinion as to whether or not it would be proper for the Controller to make a payment for time off as provided in Police Commission Resolution No. 134-70.

At its meeting of May 5, 1970, the Police Commission adopted the following resolution:

"RESOLUTION NO. 134-70

"AWARD FOR MERITORIOUS ACTS BY MEMBERS IN ASSISTING THE  
DEPARTMENT'S RECRUITMENT PROGRAM - APPROVED.

"RESOLVED, that on the recommendation of the Chief of Police and the approval of the Police Commission, members of the Department who are instrumental in obtaining qualified applicants to take the civil service examination for Q-2 Policeman, which applicants successfully pass the entrance examination, are appointed to the Police Department and complete their recruit training at the Police Academy, may be awarded under the provisions of Section 35.11 of the Charter time off with pay not to exceed eight hours for each such successful applicant be and the same is hereby approved.

"AYES: Commissioners Garner, Miller, Ferrari."

The question you raise is whether or not the "meritorious service" referred to in the Police Commission resolution is





Mr. Nathan B. Cooper

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May 13, 1970

the type of "meritorious service" which may be rewarded under Charter Section 35.11.

Charter Section 35.11 is quoted in full as follows:

"On the recommendation of the chief of police, the commission may reward any member of the department for heroic or meritorious conduct. The form or amount of said reward to be discretionary with the commission, but not to exceed one month's salary in any one instance."

The Charter section does not define the term "meritorious conduct." The ordinary meaning of the term would be something earned by service or performance.

It would appear that Charter Section 35.11 leaves it to the Chief of Police to recommend and the Police Commission to determine what type of performance or conduct will be meritorious. The decision of the Police Commission would control unless its action would show an abuse of discretion.

Rewarding the recruitment of policemen would not be an abuse of discretion and it is therefore my opinion that Police Commission Resolution No. 134-70 is a valid exercise of the Commission's authority under Charter Section 35.11.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

cc: Police Department  
Civil Service Commission

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May 22, 1970

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Mr. James F. Wurm, Director  
Management & Employee Services  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Entitlement of Craft Employees of  
Port Commission to Retroactive Payment  
for Health and Welfare Benefits

Dear Mr. Wurm:

This is in reply to your letter requesting my opinion whether there is any legal basis by which payment for health and welfare benefits for the period from February 7 through June 30, 1969, may be made to certain craft employees who occupied positions with the Port Commission.

Your letter indicates that these employees occupied positions peculiar to the Port. Upon transfer of the Port to the City and County effective February 7, 1969, the Annual Salary Ordinance was amended in order to place these employees on the City and County payroll. The amended Annual Salary Ordinance provided for a continuation of the same salaries which these craft employees had been receiving from the Port Authority immediately prior to the transfer. These salaries did not include any payment for health and welfare benefits.

As you know, the Salary Standardization Ordinance is the vehicle whereby collective bargaining rates are established for craft employees in accordance with Section 151.3 of the Charter. The Salary Standardization Ordinance for fiscal year 1968-1969 did not establish a collective bargaining rate for these craft employees as their craft classes were peculiar to the Port and did not have a counterpart in City and County employment. Apparently no attempt was made to amend the Salary Standardization Ordinance for fiscal year 1968-1969.

Effective July 1, 1969, these craft classifications are included in the Salary Standardization Ordinance for fiscal year

REPORT OF THE

COMMISSIONER OF THE  
GENERAL LAND OFFICE  
FOR THE YEAR 1904

WASHINGTON, D. C.  
BUREAU OF LAND MANAGEMENT  
DEPARTMENT OF AGRICULTURE  
1905

THE LAND OFFICE  
GENERAL LAND OFFICE  
WASHINGTON, D. C.

1905

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE FOR THE YEAR 1904. This report contains a summary of the work of the General Land Office during the year 1904, and is published for the information of the public.

The General Land Office has during the year 1904, continued its work in the management of the public lands, and has issued a large number of patents and permits. The work of the office has been carried on in accordance with the provisions of the laws governing the disposal of the public lands, and the interests of the public have been protected.

The work of the General Land Office during the year 1904, has been carried on in accordance with the provisions of the laws governing the disposal of the public lands, and the interests of the public have been protected. The office has issued a large number of patents and permits, and has continued its work in the management of the public lands.

The work of the General Land Office during the year 1904, has been carried on in accordance with the provisions of the laws governing the disposal of the public lands, and the interests of the public have been protected.

Mr. James F. Wurm

2

May 22, 1970

1969-1970 and are entitled to health and welfare payments as provided in their respective collective bargaining agreements. The employees who occupied these positions during the period from February 7 through June 30, 1969, have now requested payment for health and welfare benefits for that period.

The transfer of the Port and the rights of the transferred employees are governed by Sections 48.2, 48.3 and 48.4 of the Charter, the provisions of the "Burton Act" (Statutes of 1968, Chapter 1333) and an agreement entered into between the State of California and the City and County in implementation of that Act.

Section 20 of the Act provides that all persons in the employ of the San Francisco Port Authority at the time of the transfer shall continue to hold their positions under the civil service provisions of the Charter and that "they shall be entitled to all of the rights, benefits, and privileges which such persons might have or might have had, had such persons been originally appointed to their respective positions under certification from the civil service commission of the City and County of San Francisco."

Section 48.4 of the Charter provides in part that:

"Notwithstanding any other provisions of this charter, the city and county shall perform all acts necessary to protect the employment rights of employees of the Port Authority as specified in Section 20 of Statutes 1968, ch. 1333."

Section 151.3 sets forth the procedure for establishing the rates of pay for craft employees of the City and County. Upon transfer of the Port to the City and County, the craft employees who are involved in your request became employees of the City and County and, in accordance with the provisions of Section 20 of the Burton Act, thereby became entitled to have their rates of pay established in accordance with the provisions of Section 151.3 commencing on the effective date of the transfer. They cannot be deprived of that right simply because the Salary Standardization Ordinance, adopted prior to the transfer of the Port, did not establish rates of pay for their particular craft classes.

Pursuant to the provisions of Section 48.4 quoted above, the City and County must perform all acts necessary to protect the employment rights of the transferred employees. Accordingly,

The following table shows the results of the experiments conducted on the 10th of June 1900. The results are given in the following table.

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Mr. James F. Wurm

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the Civil Service Commission should recommend amendments to the Salary Standardization Ordinance for the fiscal year 1968-1969, together with amendments to the Annual Salary Ordinance and Appropriations Ordinance, so that these craft employees will be authorized to receive payment of the rate of pay, including health and welfare benefits, required in accordance with the provisions of Section 151.3 for the period from February 7 through June 30, 1969.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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May 27, 1970

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Mr. George J. Grubb  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Examination for Class 9364  
Superintendent, Harbor Maintenance  
and Repair

Dear Mr. Grubb:

This is in reply to your request for opinion relative to the examination for Class 9364, Superintendent, Harbor Maintenance and Repair. You have asked the following questions:

1. In accordance with charter amendment passed by voters and the acts passed by the Legislature of California relating to the take-over of the Port, may the examination for 9364 Superintendent, Harbor Maintenance and Repair, be held on a promotive basis only?

2. If you find that in your opinion the examination may not be held on a promotive basis and must be held on an entrance basis, may it then be held on both entrance and promotive bases?

3. If either an entrance examination only, or entrance and promotive examination is held, must the minimum qualifications for the entrance examination be set at a level which would qualify the current limited tenure temporary appointee?

The San Francisco Port was transferred to the City and County of San Francisco pursuant to 1968 California Statutes, Chapter 1333 and by an Agreement between the State of California and the City and County. On the date of transfer, February 7, 1969, the position of Superintendent of Harbor Maintenance in the state civil service was held by Mr. N. Lee Baccus on a temporary



Mr. George J. Grubb

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May 27, 1970

appointment which was made December 2, 1968. He now holds the position of 9364 Superintendent, Harbor Maintenance and Repair, as a temporary limited tenure appointee.

Temporary appointments in the state service are made pursuant to Section 19058 of the Government Code which provides:

"When there is no employment list from which a position may be filled, the appointing power with the consent of the board may fill such position by temporary appointment. Such temporary appointment shall continue only until eligibles are available from an appropriate employment list and not to exceed the period prescribed by Section 6 of Article XXIV of the Constitution; provided, that within the limits of the period prescribed by the Constitution any temporary appointment to a position the duration of which position is not to exceed the probationary period for the class may, in the discretion of the appointing power and with the approval of the board be continued for the life of such position. An appropriate employment list shall be established for each class to which temporary appointment is made before the expiration of such appointment."

The qualifications for temporary appointees are governed by Section 19059 of the Government Code:

"A person who does not possess the minimum qualifications for the class to which the position belongs shall not be appointed under a temporary appointment. A temporary appointee, as such, shall not acquire any probationary or permanent status or rights, and time spent under temporary appointment shall not contribute to the probationary period if the appointee is subsequently successful in an examination and is certified and appointed to the position."

Pursuant to the above quoted sections, a temporary appointment can be made only if no employment list is available for the position; the appointment cannot exceed nine months (Section 6, Article XXIV, State Constitution); the temporary appointee must possess the minimum qualifications for the class to which he is temporarily appointed; and the state is under a duty to establish an employment list before the temporary appointment expires.

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The second part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development. The third part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development.

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Mr. George J. Grubb

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May 27, 1970

Section VIII, page 24, of the Agreement relating to the Port transfer provides:

"At the time of transfer there may be some temporary or casual employees who do not have the benefit of civil service provisions. The rights of an employee in this status will terminate as it would had the property not been transferred to the City. Other employees may, however, be on temporary appointment awaiting civil service examination. In that event the City will schedule the necessary examinations as soon as possible so as to insure continuity of employment whenever possible." (Emphasis added.)

The state would have been required by Section 19058 of the Government Code to hold an examination for the position of Superintendent of Harbor Maintenance prior to expiration of the temporary appointment held by Mr. Baccus. The temporary appointee would have been eligible to compete in that examination (Section 19059 Government Code). It is, therefore, my opinion that at the time of the Port transfer, Mr. Baccus was awaiting civil service examination within the meaning of the above quoted language of the Agreement and pursuant thereto, the city is required to schedule an examination for the subject position.

Question 1:

Promotional examinations in the city service are open only to appointees holding permanent civil service status in the appropriate next lower rank (Section 11.1, Rule 4, Rules of the Civil Service Commission). A temporary appointee in state civil service does not acquire any status or rights (Section 19059, Government Code) and, therefore, such appointee is not eligible to take a city promotive examination. The Agreement requires the city to schedule examinations in which the temporary appointee can participate. Since temporary appointees are not eligible to take promotional examinations, it is my opinion that the examination for Superintendent, Harbor Maintenance and Repair cannot be held on a promotive basis only.

Question 2:

If the examination for the subject position were open to both promotive and entrance participants, the Civil Service Commission would be required to exhaust the promotional list before

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May 28, 1970

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Mr. John A. DeLuca  
Executive Secretary to Mayor  
200 City Hall  
San Francisco, California 94102

Subject: Authority for Mayor to Withhold  
Approval of Requisitions to Fill  
Vacancies to Permanent Positions

Dear Mr. DeLuca:

This is in response to your letter in which you request my opinion as to the authority of the Mayor to withhold his approval of requisitions to fill vacancies in permanent civil service positions. The contention is that the authority granted the Mayor in Section 1.1 of the Annual Salary Ordinance violates Charter Section 148. It is stated that the reason for withholding approval of the requisitions is so that the Mayor may conduct a careful scrutiny and investigation as to current need for such positions.

The Mayor derives his authority over the approval of requisitions to fill vacancies in permanent positions from the following provision of Section 1.1 of the Annual Salary Ordinance:

"Appointing Officers shall not make an appointment to a vacancy in a permanent position until the Mayor shall approve the requisition for such service as hereinafter provided."

Under the provisions of Section 9 of the Charter, the Board of Supervisors has the power to "determine the maximum number in each class of employment in each of the various departments and offices of the city and county . . . and . . . fix rates and schedules of compensation therefor in the manner provided in this charter."

The Board enumerates the maximum number of positions determined pursuant to Section 9 in the Annual Salary Ordinance,



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Mr. John A. DeLuca

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May 28, 1970

and as a part of the same ordinance, qualifies to the extent that it may legally do so, such determination by providing, in effect, that a vacancy in a position shall not be filled until the Mayor first determines the current necessity for filling the position. This authority vested in the Mayor by the Annual Salary Ordinance must be exercised consistently with Charter provisions, which cannot be contravened by ordinance, but I can find no inconsistency between the provisions of Section 1.1 of the Ordinance and the provisions of Section 148 of the Charter as the Charter section merely prescribes the procedure for filling a vacant position when it has been previously determined in the manner provided by law, including the Salary Ordinance, that the position is to be filled.

However, the Mayor would be acting in contravention of Charter provisions and beyond the scope of the authority provided by Section 1.1 if he refused to approve requisitions to fill vacancies in certain positions in certain offices and departments of the City and County. Thus, when a position has been specifically created by the Charter, the Mayor cannot refuse the filling of a vacancy in such position and must approve the requisition submitted to him to fill such vacancy. See, for example, the provisions of Section 41 of the Charter creating several specified positions in the Recreation and Park Department and authorizing the general manager of the department to make appointments to such positions.

The same is true when there is a specific Charter authority vested in an officer or a board to appoint such assistants and employees as may be authorized in the budget and annual appropriation ordinances. See, for example, the provisions of Section 34 of the Charter relating to elective officers and of Section 44 relating to the War Memorial Board, which read:

"Sec. 34. The elective officers of the city and county may appoint such assistants and employees as are authorized by the supervisors upon the recommendation of the mayor, in the annual budget and annual or supplemental appropriation ordinances, . . ."

"Sec. 44. The board shall have the power to appoint a secretary and a managing director, each of whom shall hold office at its pleasure, and such other employees as may be provided by the annual budget and appropriation ordinance."



Mr. John A. DeLuca

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May 28, 1970

Except when thus controlled by specific Charter provisions, the Mayor does have the power to determine the necessity for continuation of positions which become vacant pursuant to the authority vested in him by the provisions of Section 1.1 of the Annual Salary Ordinance and you are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



July 6, 1970

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Mr. Philip P. Engler, Acting Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File 133-70; Qualifications for  
Candidates for Board of Education

Dear Mr. Engler:

You have inquired as to the validity of a suggestion that certain qualifications for candidates for an elective school board be added to a proposed charter amendment now being considered by the Legislative and Personnel Committee of your Board. Specifically, you ask if, aside from the usual qualifications as to age and residence, additional qualifications could be added so as to require candidates to be parents with children attending public school and also be college graduates.

The State Constitution authorizes a charter city and county to establish qualifications for membership on its board of education. (Cal. Const. art. IX, §3.3; art. XI, §5; art. XXII, §8.) However, in this respect, it is a generally accepted rule of law that qualifications for office may not be arbitrary, unreasonable or discriminatory and must bear a reasonable relationship to the purpose or objective sought to be accomplished thereby. (Landes v. Town of North Hempstead, 231 N.E.2d 120; Gansz v. Johnson, 75 A.2d 831; Lee v. Clark, 77 S.E.2d 485.)

Extensive research with reference to this general rule fails to disclose any case law dealing directly with the particular qualifications mentioned in your letter.

In a somewhat analogous situation, the United States Supreme Court has held invalid a requirement that voters in a school district election must either own or lease taxable real property in the district or have a child in school. (Kramer v. Union Free School District No. 15, 395 U.S. 629, 89 S.Ct. 1886, 23 L.Ed.2d 583.) In Romano v. Redman, 304 N.Y.S.2d 261, the court cited the



Mr. Philip P. Engler

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July 6, 1970

Kramer case, supra, as authority in holding unenforceable a statute restricting the voting privilege in a local sanitary district election to property owners in the district and extended the rule to include the right to seek public office.

Some contrary authority appears in the case of Schweitzer v. Clerk for City of Plymouth, 164 N.W.2d 35, in which the Michigan Supreme Court held that the establishment of qualifications for public office is essentially a political decision and that a qualification that elective officers be property owners did not constitute an impairment of constitutional rights.

In view of the paucity of legal precedent with respect to the specific qualifications set forth in your inquiry, it is difficult to predict what decision a court would render if confronted with this issue. However, it is my opinion that if, after hearing and consideration of all the facts relating to the operation of the school district, the Board of Supervisors determines that the proposed qualifications are reasonable and necessary to ensure the proper administration of said school system, then it is within its power to include such qualifications in a measure to be submitted to the electorate.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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July 7, 1970

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Mr. T. F. Conway  
Purchaser  
270 City Hall  
San Francisco, California 94102

Subject: Civil Service Employment;  
Servicing of Airport Fire  
Department Vehicles

Dear Mr. Conway:

In response to our recent conference regarding the legality of obtaining lubrication and maintenance service for fire department equipment stationed at the San Francisco International Airport through a contractual arrangement rather than by use of civil service employees, the legality of the proposed contract has been reviewed.

#### CONCLUSION

Under the factual situation posed, you are advised that such a contract would be legal, if it does not result in the dismissal of or otherwise adversely affect any employee with civil service tenure.

#### DISCUSSION

The pertinent facts upon which the conclusion is based are that (1) the service is not of a daily nature, but is to be performed as to each of nine vehicles about four times a year; (2) the firm undertaking the work will furnish a truck completely equipped to perform the required service where the vehicles are stationed, reducing the out-of-service time for such vehicles to an absolute minimum and the number of such vehicles out of service at any one time to the lowest number possible; (3) the servicing must be performed by persons with a high degree of technical competence; (4) the airport does not have back-up units for vehicles out of service; and (5) no tenured civil service employee will be adversely affected.



Mr. T. F. Conway

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July 7, 1970

To the Purchaser of Supplies has been delegated the power to enter into agreements for all contractual services required by the several departments and offices of the city and county (Charter sec. 88). Yet all proposed personal service contracts must be closely scrutinized to see that they are not a subterfuge for evading other provisions of the charter requiring that employment by the city be under a civil service merit system with specified exceptions (Charter sec. 142). Every position under civil service requires of the holder of the position the rendition of personal service, and theoretically, at least, each such position could be the subject of a personal service contract, to the detriment and destruction of the civil service system.

The problem of reconciling the charter power to have services performed by contract, and the charter requirement that employments be under a civil service merit system is a continuing one. In 1941, the then City Attorney advised the Controller that janitorial work could not be the subject of a personal service contract because it was work ordinarily done day by day and was customarily done by employees filling civil service positions. In the same opinion, he drew a distinction between janitorial work generally and window washing, because window washing was work of a seasonal or occasional nature and could therefore be the subject of a personal service contract.

In 1946 the same City Attorney advised the Civil Service Commission that a proposed contract with a private firm to clean streetcars on a daily basis, in effect another form of janitorial service, was illegal in view of the fact that city employees were then cleaning the cars day by day under car cleaners' civil service classification.

In 1956 the then City Attorney, in response to a query from a member of the board of supervisors, advised that the transfer of certain work performed by men occupying the position of Airport Attendant to an airport lessee (fixed-base operator), and the simultaneous restatement of the duties assigned to Airport Attendants, was legal, where none of the employees involved were adversely affected in their civil service status.

In 1963, in letter opinion No. 63-10, I advised the Manager of Utilities that it would be legal to contract with a private firm to provide buses and drivers to furnish an airport courtesy coach service between the terminal buildings and outlying parking lots, but that it would not be legal to contract for drivers to



Mr. T. F. Conway

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July 7, 1970

operate city-owned buses in such service, in view of existing bus driver positions in city service.

In 1968, in letter opinion No. 68-9, to the assistant general manager of public utilities, I advised that it would be improper to contract with a landscaping firm to provide lawn mowing services at various Water Department reservoir locations, because the work was not of an expert or professional nature, and suggesting that the type of service required lent itself to the part-time category of civil service employment under Charter sec. 142.

The basic principle of civil service, as enunciated in judicial decisions, is that of a service in which appointments and promotions are based upon merit, and employees' job security is protected by relatively high assurances of tenure. Manifestly, civil service rules do not guarantee to officers or employees the tenure of positions which are no longer required and it is highly desirable from a standpoint of personnel efficiency, as well as in accord with considerations of public economy, that the department head may have the power to reduce his staff (Charter sec. 20). Such reductions, however, must follow civil service procedures and be in good faith (Hanley v. Murphy (1953) 40 Cal.2d 572). It has been held that "good faith" is not shown where the propriety of reduction of staff was questionable in view of the evidence that the work of the position remained the same, there were ample funds to pay the salary, and the work was assigned to others not qualified to perform it. (Charamuga v. Cox (1962) 207 Cal.App.2d 853.) See also, Rexstrew v. City of Huntington Park (1942) 20 Cal.2d 630.)

Thus, if the proposed contract would not result in the discharge or shifting to less responsible tasks of one or more civil service employees with tenure, the proposed contract would be legal.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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July 13, 1970

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Honorable Dianne Feinstein, President  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Gas Tax Moneys; Use Thereof for  
Summer Youth Work Program

Dear Supervisor Feinstein:

This is in response to your request for an opinion with respect to a proposal that the City and County use gas tax moneys to employ young people to perform street work during the summer months.

The controlling law with respect to the use of gas tax moneys is set forth in the State Constitution. Article XXVI, section 1 of the Constitution provides, in part, that: "... all moneys collected from any tax now or hereafter imposed by the State upon the manufacture, sale, distribution or use of motor vehicle fuel, . . . shall be used exclusively and directly for highway purposes, as follows: (1) The construction, improvement, repair and maintenance of public streets and highways, . . . and for administrative costs necessarily incurred in connection with the foregoing."

Article XXVI is basically an antidiversion provision in that its purpose is to prevent diversion or circuity in the use of the funds. (22 Ops. Atty. Gen. 49.) In implementation of article XXVI, the State Legislature has enacted various statutes with respect to the use of gas tax funds distributed to counties and to cities. Section 2150 of the Streets and Highways Code provides that: "All money received by a county . . . shall be expended by the county exclusively for county roads and for other public street and highway purposes as provided by law." Section 2107.4 of the Streets and Highways Code provides that: "Two-fifths of the moneys apportioned under the provisions of Section 2107 [cities and cities and counties] shall be expended for the construction of







Honorable Dianne Feinstein

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July 13, 1970

streets included in the select system within such city or city and county. . . . Three-fifths of the moneys . . . shall be expended for the maintenance of the select system and other streets within such city or city and county . . ."

As a general rule, the courts both in California and in other jurisdictions have applied a liberal rule in interpreting antidiversion laws such as article XXVI. (San Francisco v. Boyd, 17 Cal.2d 606; Cory v. King, 8 N.W.2d 614; Keck v. Manning, 231 S.W.2d 604; Carter v. Miley, 103 P.2d 933; Grauman v. Dept. of Highways, 151 S.W.2d 1061; Anderson v. American State Bank, 11 S.W.2d 444.) In addition, the Attorney General has ruled that gas tax funds may be used to finance construction of an asphalt plant if the purpose of the plant is to supply asphalt mix for highway purposes. (22 Ops. Atty. Gen. 49.)

At the local level, the City and County of San Francisco has, in the past few years, used gas tax funds for street cleaning purposes.

Accordingly, it is my opinion the gas tax moneys could be used for a youth summer job program in the City and County if such work is directly related to the "construction, improvement, repair and maintenance of public streets and highways."

In closing, it should be pointed out that the effectuation of such a summer work program would call for the preparation, by the appropriate department of the City and County, of the details of said program in accordance with the civil service and budgetary provisions of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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July 14, 1970

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Mr. S. M. Tatarian  
Director of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Civil Service Employment: Truck  
Driver at Sewage Treatment Plants

Dear Mr. Tatarian:

This is in reply to your letter inquiring as to the abolition of one permanent civil service position, namely, that of a truck driver hauling grit and screenings from the sewage treatment plants and the contracting of such service to a private company.

Section 142 of the Charter requires that all positions in the City and County service, with certain specified exceptions not applicable here, shall be included in the classified civil service of the City and County. As interpreted and applied by the courts, such civil service provisions of basic law require as a general principle that where the services are permanent and of such a nature that they can be satisfactorily performed by one selected under the provisions of civil service, that the selection must be made in that manner and not by independent contract. (See Stockburger v. Riley, 21 Cal.App.2d 165; State Compensation Insurance Fund v. Riley, 9 Cal.2d 126; California School Employees Assn. v. Willits Unified School District, 243 Cal.App.2d 776; California School Employees Assn. v. Sequoia Unified High School District, 272 Cal.App.2d 98.)

In connection with certain services, special circumstances may exist which would justify the performance of the services under an independent contract. See, for example, the cases of San Francisco v. Boyd, 17 Cal.2d 606, and Kennedy v. Ross, 28 Cal.2d 569, where the courts upheld the legal propriety under the City Charter of retaining expert temporary services by contract, and also the case of Burum v. State Compensation Insurance Fund, 30 Cal.2d 575, where the court sustained the hiring of expert temporary services



Mr. S. M. Tatarian

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July 14, 1970

under contract where it was demonstrated that the services could not be satisfactorily performed under existing civil service classifications.

In the instant situation, it appears that the nature of the hauling services are within the scope of the general description of the duty statements established for the truck driver civil service classifications and that the services have always been performed on a permanent basis by civil service truck drivers. It having thus been determined that the services could be satisfactorily performed by civil service employees, and the services having been so performed for a number of years, in order to justify a change from civil service performance to independent contract performance it would now be incumbent that there be demonstrated a change in previously existing circumstances which would bring the situation within the ambit of one of the judicially accepted exceptions to civil service requirements. I have carefully reviewed the facts and arguments set forth in your letter and I am unable to conclude that at present special or changed circumstances exist which would warrant the proposed attrition of the civil service requirements of the Charter.

In essence, your proffered justification consists in arguments as to greater economy and efficiency, other existing contractual arrangements, and anticipated future changes in operating procedures in connection with the disposal of waste at the sewage treatment plants. The argument as to greater economy and efficiency was advanced in the Stockburger v. Riley case, *supra*, and the case of California School Employees Assn. v. Sequoia Union High School District, *supra*, and was rejected by the courts in those cases, the court pointing out in the latter case as follows, 272 Cal.App.2d, p. 105:

"The fact, if it be such, that the proposed contract method of providing food is more economical than the operation of a cafeteria can neither affect the association's right to sue, nor enlarge the district's powers beyond those conferred by law. (See Stockburger v. Riley (1937), 21 Cal.App.2d 165, 167, 68 P.2d 741.)"

With reference to other contractual arrangements for the performance of services for the City and County, each case must be decided on its own particular facts and there are obvious factual elements existent in the other situations cited in your letter which distinguish them from the present situation. As to anticipated future changes in operations at the sewage treatment plants,



Mr. S. M. Tatarian

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July 14, 1970

such changes could very well result in a factual situation that would justify an independent contract arrangement when such changes occur. This opinion is based on the facts as they presently exist and is limited thereto. When changes occur at the plants affecting the existing situation which you feel justify a contractual arrangement for the hauling in question, I shall be pleased to review the matter at that time upon your request.

You are advised that based on existing circumstances as outlined in your letter it is my opinion that the proposed contractual arrangement for hauling grit and screenings from the sewage treatment plants would be in violation of section 142 of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





July 21, 1970

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Honorable Dianne Feinstein  
President, Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Legality of Retirement Board's  
Utilization of Committee of Board  
in Making Investment Decisions

Dear Mrs. Feinstein:

I have your letter dated July 16, 1970, requesting my opinion as to the legality of the Retirement Board's utilization of a committee of the Board in the making of investment decisions.

I am informed that the Retirement Board has designated three of its members to act as an "investment committee." The members of the investment committee confer privately, usually by telephone, and thereafter recommend purchases of bonds for the Retirement System. In the usual case, this recommendation is passed on to the Chief of Investments of the Retirement System, who thereupon contacts the securities dealers handling the particular issue of bonds and indicates that the Retirement System is interested in purchasing the bonds. At the next regular meeting of the Retirement Board, the recommendation of the investment committee is presented to the full Board for its approval.

Initially, your request requires a consideration of the applicability of the Ralph M. Brown Act (Gov. Code §§ 54950, et seq.) to the procedure being followed by the Retirement Board as outlined above. The Brown Act requires that all meetings of the legislative body of a local agency be open and public (Gov. Code § 54953). For purposes of the Act, "legislative body" means the governing board, commission, directors or body of a local agency, or any board or commission of the local agency. (Gov. Code § 54952.) In keeping with these provisions, meetings of the Retirement Board must be open and public.



Honorable Dianne Feinstein

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July 21, 1970

However, it must be noted that the Brown Act does not prohibit private meetings of a committee of a board such as the Retirement Board, so long as the committee is composed solely of members of the Board who constitute less than a quorum of the Board. (Gov. Code § 54952.3.) The Retirement Board consists of seven members and, therefore, a quorum for the transaction of the Board's business is four members. (Charter § 19.) Consequently, a committee consisting of three or less members of the Retirement Board would not be required to hold open and public meetings.

Secondly, the procedure outlined above and being followed by the Retirement Board is such that there is no actual purchase of bonds until approval of the full Retirement Board has been obtained. The action of the Chief of Investments in indicating that the Retirement System is interested in purchasing certain bonds is not a final commitment to purchase said bonds. His action serves to reserve the bonds for purchase by the Retirement System, subject to the approval of the full Retirement Board. Thus, the purchase of bonds is not consummated (and it cannot legally be consummated) until after the full Board has taken action approving the purchase.

In conclusion, therefore, please be advised that the procedure which is the subject of your letter does not violate any provisions of law applicable to the Retirement Board.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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July 27, 1970

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Mr. Joseph E. Tinney  
Assessor  
101 City Hall  
San Francisco, California 94102

Re: Block 351, Lot 4,  
Claim for Refund of Taxes  
by Samuel Alterman

Dear Mr. Tinney:

This will acknowledge receipt of your letter in connection with a "Claim of Refund of Taxes" for taxes allegedly erroneously or illegally collected from Samuel Alterman. With your letter you enclosed a Memorandum received from the Clerk of the Board of Supervisors in connection with this same matter.

The pertinent facts involved in this case are as follows:

1. On December 8, 1967, the City instituted condemnation action No. 586197 for the extension of Seventh Street, and one of the parcels involved in this action is owned by Samuel Alterman, which property is the subject matter of this inquiry.
2. On December 14, 1967, the City deposited with the court security for an order for immediate possession of this property.
3. On December 20, 1967, an order of immediate possession was obtained from the court giving April 1, 1968, as the date for possession to be taken of this property.
4. On March 8, 1968, Samuel Alterman withdrew the security deposited with the court and in connection with the withdrawal paid the City its lien for the then current installment of taxes, for the final installment of 1967-68 taxes as due through June 30, 1968.



Mr. Joseph E. Tinney

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July 27, 1970

5. On or about April 20, 1968, the City took actual possession of this property and thereafter proceeded to demolish the improvements thereon and to construct on this and certain other parcels the extension of Seventh Street to the north side of Market Street.
6. The taxes for the year 1968-69 assessed to this property went unpaid and the property was formally sold to the State for nonpayment of taxes on June 30, 1969.
7. Samuel Alterman asserts that through inadvertence his accountant prepared and he signed a check in the sum of \$1,382.62 for the first installment of the 1969-70 taxes, which check was marked "paid" by the City's tax collector on December 9, 1969, under receipt No. 11443.
8. Samuel Alterman now seeks to have the Board of Supervisors refund to him the \$1,382.62 as taxes illegally or erroneously collected, under the provisions of § 5096(b) of the Revenue and Taxation Code.

The general rule of law is that a condemnee is liable for taxes until title to the property has passed to the condemnor. Actually title does not pass to the condemnor until a certified copy of a final order of condemnation is recorded in the office of the Recorder of the County. (CCP 1253.) In this case no final order has or can yet be obtained so actual final title is in the condemnor.

The question thus presented is whether the facts as outlined in this case present an exception to the general rule above stated. The answer would appear to be "Yes", that the facts here do present such an exception. Here, it will be recalled that an order of immediate possession of the property was sought and obtained and actual physical possession of the property was taken, and the building thereon demolished and the property used for construction of a street. The facts are quite similar to those which were presented in the case of People v. Peninsula Title Guaranty Co. (1956) 47 Cal.2d 29, 31, 32, 33, 34, where an order of immediate possession was obtained and possession taken, and the State then proceeded to remove buildings and construct an overpass thereon. No final judgment had been rendered or recorded





Mr. Joseph E. Tinney

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July 27, 1970

and the question was whether recovery could be had on an assessment lien levied against the property after possession was taken and the State commenced removing the buildings and constructing the overpass. The Supreme Court said that under these circumstances the lien could not be recovered upon. In this connection the court said:

"In situations where it can be said that in addition to a mere taking of possession by the condemnor there is also such a substantial change in the status of the land taken and the condemnee's relation to it as to constitute, in effect, a divestiture for all practical purposes of all of the former owners' interest, the strict rule should not apply. . . ." (P. 32.)

"It should be clear from the foregoing that a distinction is drawn between the legal effect of passage of title and the 'taking' of the property involved. There is no passage of title in condemnation proceedings until an award has been made and the final judgment in condemnation filed in the office of the county recorder. (Code Civ. Proc. § 1253; Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, [107 P.2d 618].) However, as an exception to the strict application of the law, it is recognized that a 'taking' of sufficient consequences is deemed to have the same effect of finality of transfer for specific purposes as does the passage of title. . . ." (P. 33.)

" . . . In any event it appears in the present case that the dispossession of the defendants and the acts of appropriation, destruction and damage brought about by the state prior to judgment constitutes a 'taking' as contemplated by the constitutional provision. . . ." (P. 34.)

" . . . In the present case the effective 'taking' by the condemnor is advanced from the time of the award to the time of appropriation of the property, that is, June 21, 1953, which was prior to the time of the levy. . . ." (P. 35.)

In the City of Long Beach v. Aistrup (1958) 164 Cal.App.2d, 41, 45, 49, the court said:



Mr. Joseph E. Tinney

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July 27, 1970

"The questions are these:

"1. In a proceeding in eminent domain where the condemner is a tax-exempt public corporation, does the taking of possession by the condemner prior to the date of attachment of tax liens render such property tax-exempt? . . ." (P. 45.)

"It will be noted that in Peninsula (supra) the assessment lien became effective after the condemnees were deemed to have been divested of their rights in the property by the taking of possession by the condemner and that as a consequence the condemnees were entitled to compensation without deduction on account of the assessment lien. Thus, Peninsula (supra) disposes of the county's contention with respect to the instances at bar in which the liens for taxes became effective after the condemner took possession." (Emphasis ours.) (P. 49.)

It would thus appear that under the specific facts in this matter the subject property was exempt from taxation for the 1969-70 tax year, and the collection of \$1,382.62 as the first installment thereof was an erroneous collection under the provisions of section 5096(b) of the Revenue and Taxation Code, and, therefore, should be refunded thereunder. Section 5096 of the Revenue and Taxation Code provides in part as follows:

"On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were:

"(a) . . .

"(b) Erroneously or illegally collected."

In the case of El Tejon Cattle Company v. County of San Diego (1967) 252 Cal.App.2d 449, 457, 458, the court said in part as follows:

"The collection of taxes on property exempt from taxation is an erroneous or illegal collection within the meaning of section 5096, Revenue and Taxation Code. (City of Long Beach v. Board of Supervisors, 50 Cal.2d 674, 679, [328 P.2d 964].) . . ." (P. 457.)



Mr. Joseph E. Tinney

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July 27, 1970

"Many of the cases cited by plaintiff have dealt with property exempt from taxation. As we have seen, taxes assessed against such property and collected are illegally and erroneously collected." (P. 458.)

Therefore, responding to your inquiry for advice, may I say that it is my opinion, for the reasons heretofore given, that your office should recommend to the Board of Supervisors that they grant the refund of taxes requested in this matter as having been erroneously or illegally collected.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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August 5, 1970

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Chief Alfred J. Nelder  
San Francisco Police Department  
Hall of Justice  
850 Bryant Street  
San Francisco, California 94103

Subject: Necessity of Police Department to  
Put EDP Program Out to Bid;  
Your File No. H-543

Dear Chief Nelder:

This is in response to your request of July 16, 1970, requesting advice as to whether your department may enter into a contract to study its Electronic Data-Processing needs without advertising for bids.

From your correspondence it appears that the contract contemplated would provide special services in the study of your department's particular needs and would lead to advice and recommendations for implementation of an Electronic Data-Processing system.

The San Francisco Administrative Code provides that procurement of special or professional services

" . . . shall be made in accordance with written rules and regulations established by the Purchaser and approved by the Chief Administrative Officer and the Controller."

The rules promulgated for service contracts require that the services be (1) defined by the Purchaser as "Professional" or "Special"; (2) approved as such by the Chief Administrative Officer; and (3) listed and filed with the Controller. When these conditions are satisfied the services may be purchased without competitive bidding.





Chief Alfred J. Nelder

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August 5, 1970

It appears from your letter that the required services will be of a highly specialized nature. If that is the case, the contract could qualify under San Francisco Administrative Code §21.18, and bidding would not be required.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



August 10, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Duty of State to Fund City and County  
Programs Required by State Law or  
Court Order

Dear Mr. Dolan:

This is in response to the request of Supervisor Robert E. Gonzales that I review the applicable law to determine whether or not the State of California must provide sufficient funds for the financing of any program which a city, county or city and county is compelled to undertake as a result of a directive of the state courts or an action of the State Legislature. He also asks if the state could be joined as a party-defendant in any action to compel the City and County to comply with such directive or action.

With respect to your first question, neither the state nor a political subdivision thereof can be charged with a liability unless it is authorized by law. (Mattingly v. Nichols, 133 Cal. 332.) Accordingly, the duty, if any, of the state to provide sufficient funds for the financing of any program which a city, county or city and county is compelled to undertake as a result of a court order or a legislative act must be set forth by statute.

By the same token, the City and County of San Francisco, as both a city and a county, has the powers and performs the functions of both. (Nicholl v. Koster, 157 Cal. 416.) As a county, it is a legal political subdivision of the state for governmental purposes and the State Legislature has inherent power to prescribe the powers, duties and obligations of such a subdivision in exercising governmental functions on behalf of the state. (Los Angeles v. Riley, 6 Cal.2d 625.) As a chartered city, it has invoked the power conferred by article XI, section 5 of the State



Mr. Robert J. Dolan

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August 10, 1970

Constitution to act free of state legislative control with respect to municipal affairs (Charter, §2) but when acting in respect to any matter of statewide concern, it is subject to and controlled by the general laws of the state. (Madison v. City and County of San Francisco, 106 Cal.App.2d 232; Galli v. Brown, 110 Cal.App.2d 764.)

State aid to school districts is provided for by law with respect to the public school system (Cal. Const. art. IX, §6); to political subdivisions providing for the support of orphans, needy children, needy blind persons, indigent aged persons and needy physically handicapped persons (Cal. Const. art. XIII, §21(6)); and to counties for providing counsel for persons unable to afford the same (Penal Code, §987(b)).

Legislation in the form of an initiative constitutional amendment which would have required the State of California to provide not less than 50 per cent of the costs for public schools, and 90 per cent of the costs for social welfare services, exclusive of federal participation, and all of the costs for new county services required by state law was submitted to the electors of the state at the primary election held on June 2, 1970, but failed to carry. In my opinion, such legislation or legislation similar in nature, is necessary before the state could be charged with liability for the costs of any program imposed by law or court order on a political subdivision of the state.

With respect to your second question, a party-defendant in an action to compel him to perform an act which the law specially enjoins may raise the issue of proper parties if his duty to perform the act does not arise until another party or parties performs certain acts which the law enjoins upon them. (Valley Motor Lines v. Riley, 22 Cal.App.2d 233.) This issue may be raised by demurrer, and if the demurrer is sustained, the action is dismissed without prejudice to the institution of another action or proceeding. (Valley Motor Lines v. Riley, supra.)

Accordingly, in the event an action were to be taken to compel the City and County to comply with a court order or legislative act and it could be shown that compliance by the City and County with such order or act is dependent upon funding by the state pursuant to law, it is my opinion that the City and County could successfully resist such action until all parties necessary to a full and complete decision in the matter were brought before the court.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
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ADMINISTRATIVE  
ASSISTANT

August 12, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Municipal Pier; Use of Gas Tax  
to Provide Lighting Thereon if  
Dedicated as a Public Street

Dear Mr. Dolan:

This is in response to the request of Supervisor John A. Ertola for an opinion as to whether or not San Francisco might dedicate the municipal pier at the foot of Van Ness Avenue as a public street and thereby use gas tax funds for the installation of lighting on said pier.

Article XXVI, section 1 of the State Constitution provides that gas tax funds shall be used exclusively and directly for, inter alia, "the construction, improvement, repair and maintenance of public streets and highways." Section 3 of the same article empowers the Legislature to provide the manner of expenditure of gas tax funds by the state, counties, cities and counties, or cities for the purposes specified and to enact legislation not in conflict with the article.

In section 2107.4 of the Streets and Highways Code, the Legislature has provided that gas tax funds apportioned to a city or a city and county shall be expended as follows: Two-fifths of the moneys shall be expended for the construction of streets included within the select system within such city or city and county, and three-fifths of the moneys shall be expended for the maintenance of the select system and of other streets within such city or city and county.

The "select system" of city streets referred to in section 2107.4 are those streets which are designated as such by the city and county in a report and on a map or maps filed with the State





Mr. Robert J. Dolan

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August 12, 1970

Department of Public Works and reviewed and approved by said department. (Streets and Highways Code, §186.3.) Any route included in the select system of city streets must meet one or more of the following tests: (1) It shall provide an important traffic connection to a route in the state highway system; (2) it shall be an important traffic lateral between two or more routes in the state highway system; (3) it shall afford substantial traffic relief to one or more routes in the state highway system. Any route not qualifying, or only partially qualifying, under any one or more of the foregoing tests may be included in the select system only upon a showing of cause by the city in its report and upon a determination by the State Department of Public Works that sufficient cause exists for the inclusion of the route in the system. (Streets and Highways Code, §186.4.)

Applying the foregoing tests to the Municipal Pier at the foot of Van Ness Avenue, it does not reasonably appear that said pier would meet any one of the qualifications for inclusion in the select system of city streets within the City and County of San Francisco and, hence, could only be included therein upon a showing of cause by the City and County and approval thereof by the State Department of Public Works. If this were to prove unavailing the two-fifths apportionment of City and County gas tax funds allocated to expenditures for construction of streets included in the select system within the City and County could not be used for street lighting purposes.

We then look to the purposes for which the three-fifths apportionment of City and County gas tax funds may be expended, viz., maintenance of the select system and of other streets within the City and County.

The term "maintenance" is defined in section 27 of the Streets and Highways Code, as including:

"(a) The preservation and keeping of rights-of-way, and each type of roadway, structure, safety convenience or device, planting, illumination equipment and other facility, in the safe and usable condition to which it has been improved or constructed, but does not include reconstruction or other improvement.

"(b) Operation of special safety conveniences and devices, and illuminating equipment.



Mr. Robert J. Dolan

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August 12, 1970

"(c) The special or emergency maintenance or repair necessitated by accidents or by storms or other weather conditions, slides, settlements or other unusual or unexpected damage to a roadway, structure or facility."

It does not appear the installation of lighting on a city street is included within the term "maintenance" as used in the Streets and Highways Code. Hence, in my opinion, gasoline tax moneys may not be properly expended therefor.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
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ASSISTANT

August 12, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Vehicle License and Gas Tax Funds;  
Use Thereof to Pay Salaries of  
Employees Engaged in Regulation  
and Control of Traffic

Dear Mr. Dolan:

In your letter of July 28, 1970, you advise that Supervisor John A. Ertola has requested an opinion as to the use of vehicle license and gas tax funds to pay the salaries of traffic policemen, meter maids, and others who control traffic within the City and County.

In City Attorney's Opinion No. 755, dated December 17, 1953, my predecessor advised that the provisions of article XXVI, section 1 of the State Constitution precluded the use of gas tax funds for such purposes but the provisions of section 2 of the same article authorized the use of revenues derived from motor vehicle registration and license fees for such purposes. Inasmuch as there has been no change in the constitutional provisions upon which the opinion was based, I would concur in the conclusion reached by my predecessor.

For your further information, the Controller's office advises me that revenues derived from motor vehicle registration and license fees are now appropriated to the Police Department for traffic control purposes within the City and County of San Francisco.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAYOR'S OFFICE  
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ALBANY, IND. VI  
ASSISTANT

August 19, 1970

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Honorable John A. Ertola  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Legislation to Curtail Loitering  
in the Fisherman's Wharf Area

Dear Supervisor Ertola:

This is in response to your inquiry as to the possibility of some sort of ordinance to prevent undesirables from loitering in the Fisherman's Wharf area.

Section 20, Part II, Chapter VIII, of the San Francisco Municipal Code states:

"No person shall wilfully sit, lie or sleep in or upon any street, sidewalk or other public place in such a manner as to obstruct the free passage or use in the customary manner of such street, sidewalk or other public place."

Section 647c of the California Penal Code proscribes any conduct that "wilfully and maliciously obstructs the free movement of any person, on any street, sidewalk, or other public place or on or in any place open to the public. . . ."

Section 647 of the California Penal Code entitled "Disorderly conduct" states in part as follows:

"Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

" . . .

"(e) Who loiters or wanders upon the streets or from place to place without apparent reason or





Honorable John A. Ertola

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August 19, 1970

business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

As indicated by the above statutes, the present law prohibits loitering in public places, and it would appear that new legislation is not required. Unless the Fisherman's Wharf area presents a unique situation, the legislation now in effect appears to adequately cover the subject.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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August 26, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Taxicab Safety Equipment  
Your File No. F 529-69-2, 4

Dear Mr. Dolan:

This refers to your prior correspondence inquiring as to the legality and advisability of requiring taxicab passengers to fasten themselves in safety belts provided and to require taxicab drivers to lock passengers in the taxicabs.

As to the legality of such legislation, you may note that the matter of licensing and regulating the operation of vehicles for hire is a proper subject of local ordinance. (Cal. Veh. Code, §21100(b).) Although State statutes do require the installation and use of seat belts in certain vehicles, such as driver training vehicles and firefighting vehicles (Cal. Veh. Code, §27304, 5), they do not yet extend to vehicles for hire and do not yet appear to occupy the field to the exclusion of a local ordinance on the subject.

There is no California law pertaining to the legality of locking passengers in the taxicabs. Closely analogous, however, is a recent Wisconsin case upholding a State statute requiring motorcyclists to wear safety helmets. (Bisenius v. Karns, 42 Wis. 2d 42, 165 N.A.2d 377; 1969.) The court upheld the Wisconsin statute because it bore a real and substantial relation to the public health and general welfare. The constitutional test applied by the court in Bisenius was that the statute was reasonable, applied to all equally, and was directly related to highway safety. (Cf. 165 N.W.2d 377, 384.)

It therefore appears that the advisability of enacting the legislation which you inquire about rests with your discretion



Mr. Robert J. Dolan

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August 26, 1970

after considering all facts and circumstances presented to you as measured by the aforementioned law.

Your deliberation of the proposed legislation should include consideration of the fact that taxicabs, as common carriers, are exposed to damages in civil liability for detaining passengers for evasion of, or dispute over payment of fares. (Squires v. Southern Pacific Co., 42 C.A. 459; 14 Am.Jur.2d §1208 et seq.)

Proposed amendments to the Police Code are enclosed for your convenience.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



August 28, 1970

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Honorable Dianne Feinstein, President  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Gas Tax Moneys; Use Thereof  
for Undergrounding Utilities

Dear Supervisor Feinstein:

This is in response to your request for an opinion as to whether or not the undergrounding of utilities may be classified as "street work" for which gas tax moneys may be expended.

As pointed out in Letter Opinion No. 70-37, dated July 13, 1970, two-fifths of the gas tax moneys apportioned to the City and County may only be expended for the construction of streets included in the select system within the City and County and the remaining three-fifths may only be expended for the maintenance of the select system and other streets within the City and County. (Streets and Highways Code, §2107.4.) (The "select system" referred to in the code consists, in general, of the major trafficways of the City and County.)

The term "construction" as used in the code includes "such illumination of streets, roads, highways and bridges as in the judgment of the body authorized to expend such funds is required for the safety of persons using the same." (Streets and Highways Code, §29.)

The term "maintenance" includes "The preservation and keeping of . . . illumination equipment . . . in the safe and usable condition to which it has been improved or constructed, but does not include reconstruction or other improvement." (Streets and Highways Code, §27.)

Accordingly, it is my opinion that, under the aforesaid provisions of state law, the undergrounding of utilities to the extent it involves the undergrounding of street lighting





Honorable Dianne Feinstein 2

August 28, 1970

facilities on streets included in the select system of the City and County may be classified as "street work" for which the two-fifths portion of gas tax moneys apportioned to the City and County of San Francisco pursuant to Section 2107.4 of the Streets and Highways Code, may be expended if it is the judgment of the Board of Supervisors that such street lighting facilities are required for the safety of persons using said streets.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

REC'D  
MAR 22 1970  
OFFICE  
MAY 22 1970  
MAY 22 1970

September 8, 1970

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Honorable Dianne Feinstein, President  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Gas Tax Funds Allocated for  
Construction Purposes; Use Thereof  
for Summer Youth Work Program

Dear Supervisor Feinstein:

You have asked if the gas tax funds referred to in Letter Opinion No. 70-37 as being allocated for the purpose of construction of streets included in the select system may be used for a Summer Youth Work Program inasmuch as the gas tax funds allocated for street maintenance purposes are usually expended in toto each year for on-going programs and apparently would not be available for such a program.

As stated in the aforesaid opinion, Section 2107.4 of the Streets and Highways Code provides that "Two-fifths of the moneys apportioned under the provisions of Section 2107 [cities and cities and counties] shall be expended for the construction of streets included in the select system within such city or city and county . . ."

The "select system" of city streets referred to in Section 2107.4 are those streets which are designated as such by the city and county in a report and on a map or maps filed with the State Department of Public Works and reviewed and approved by said department. (Streets and Highways Code, § 186.3.) Generally speaking, the routes included in the select system comprise the major trafficways of the City and County. (Streets and Highways Code, § 186.4.)

The term "Construction" as used in the Streets and Highways Code is defined in Section 29 thereof as including:



Honorable Dianne Feinstein

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September 8, 1970

"(a) Acquisition of rights-of-way and material sites and the payment of damage claims under Section 14 of Article I of the Constitution.

"(b) Construction.

"(c) Reconstruction.

"(d) Replacement.

"(e) Any improvement excepting maintenance as defined in Section 27.

"(f) Such improvements, without being limited thereto, may include, where capital outlay is required, provision for special safety conveniences and devices, roadside planting and weed control, and such illumination of streets, roads, highways, and bridges as in the judgment of the body authorized to expend such funds is required for the safety of persons using the same."

Accordingly, it is my opinion that the two-fifths portion of gas tax funds allocated for the construction of streets included in the select system within the City and County may be used for a Summer Youth Work Program provided the program is limited to streets within the select system and the work is "construction" work as that term is defined in the Streets and Highways Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



September 11, 1970

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Mr. Harry Albert  
Assistant General Manager  
Personnel Division  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Duty of City Department to Advise  
Dismissed Civil Service Employee of  
Right of Appeal; Jurisdiction of  
Civil Service Commission Where Advice  
Not Given and Time for Appeal Expires

Dear Mr. Albert:

This is in response to your request for advice as to whether there is any obligation on the part of a department to inform a dismissed permanent civil service employee of his appeal rights and, if such an obligation does exist, may the Civil Service Commission assume jurisdiction in a case where such a dismissed employee appeals after the Charter-provided time limit has passed.

Section 154 of the Charter provides that "The finding of the appointing officer shall be final, unless within 30 days therefrom the dismissed employee appeals to the Civil Service Commission." Under this language, the filing of an appeal within the 30-day period is jurisdictional and, if an appeal is not filed within that period, the action of the department head is final. The Civil Service Commission has no jurisdiction or power to consider an appeal filed after the Charter-prescribed time has expired.

There is no legal requirement that a dismissed employee be notified of his appeal rights. However, in the interests of fairness to the employees and as a voluntary matter, the Commission may wish to consider recommending to the department heads that the dismissal notices contain a statement informing the dismissed employee of his appeal rights.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





September 24, 1970

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Mr. Frank N. Alioto, President  
Fire Commission  
City and County of San Francisco  
260 Golden Gate Avenue  
San Francisco, California 94102

Subject: Fire Safety Technician

Dear Mr. Alioto:

This is in reply to your request for opinion in which you ask the following questions relating to the Fire Safety Technician Program:

- "1. Reference -- City Attorney Letter Opinion #70-16, page 3, paragraph 5.

' . . . and that the promotional examination will be held in conjunction with the entrance examination.'

Does this mean that the FST's will take their promotional examination at the same time candidates for entrance H-2 positions take their examination; or does it mean that FST's will take a two-part examination -- entrance and promotional?

- "2. FST's will be promoted into the H-2 Fireman rank. How will this promotion affect their seniority rights as to credit for future promotional examinations? Will time spent as an FST count for future promotion?
- "3. FST's will have a three-month evaluation period. Will they have any probationary status after this?"



Mr. Frank N. Alioto

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September 24, 1970

Question No. 1:

I rendered Opinion No. 70-16 dated April 1, 1970, in response to a question asked by Mr. George J. Grubb, General Manager, Personnel, in which he asked whether promotive examinations from the Fire Safety Technician Class could be legally held in conjunction with entrance examinations to Class H-2 Fireman. I concluded that the promotional examination could be held in conjunction with the entrance examination and since the question was not asked, I did not discuss the legality of holding the promotional examination from Fire Safety Technician to H-2 Fireman at a different time than the H-2 Fireman entrance examination. It is my opinion that since the Civil Service Commission has a broad discretion with respect to giving civil service examinations (Section 145, Charter), the Commission, in its discretion, could legally give the promotional examination for Fire Safety Technician to H-2 Fireman at a different time than other candidates take the entrance examination to H-2 Fireman.

Question No. 2:

Section 146 of the Charter provides in part as follows:

" . . . all promotions in the uniform forces of the police and fire departments, respectively, shall be made from the next lower civil service rank attained by examinations, as herein set forth, giving consideration also to meritorious public service and seniority of service and a clean record in the respective departments."

In subsequent paragraphs of Section 146, there is specified the credits allowed for seniority of service in promotive examinations in the Fire Department. Credits are given "for each year of service in the fire department."

The several ranks in the Fire Department are designated in Sections 36, 38.01 and 38.1 of the Charter. The class "Fire Safety Technician" is not a designated rank in the Fire Department and therefore such class cannot be deemed a part of the uniform force within the interpretation of the Charter. It is a reasonable construction of Section 146 that seniority credits on taking fireman promotive examinations can be given only for years of service in the uniform force of the Fire Department. Therefore, it is my opinion that service in the Fire Safety Technician class cannot be considered for seniority credits under



Mr. Frank N. Alioto

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September 24, 1970

Section 146 of the Charter when such employee takes promotive examinations in the uniform force of the Fire Department.

Question No. 3:

"Fire Safety Technician" is a new civil service class which will be governed by the civil service provisions of the Charter. Section 148 of the Charter provides, in part:

"Any appointment to a position declared permanent by the Civil Service Commission shall be on probation for a period of six months, . . ."

The appointment to Fire Safety Technician will be initially made on a limited tenure basis. An entrance examination will then be given and, upon certification to the entrance rank of Fire Safety Technician, the appointee will serve a six-month probationary period, as provided in Section 148 of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



September 25, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Section 151, Charter; Salary Investi-  
gation and Survey "in this State"

Dear Mr. Dolan:

This is in response to your request of September 22, 1970, inquiring whether the salary survey conducted by the Civil Service Commission under the provisions of Section 151 of the Charter can be restricted in geographical area to the San Francisco region and its immediate vicinity. In particular you ask my interpretation of the phrase "in this state" as contained in the following portion of Section 151 of the Charter:

"The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state." (Emphasis added.)

Section 151 was first enacted in 1932 and it then provided in part:

"Such compensations shall be not higher than prevailing rates for like service and working conditions in private employment or in other comparable governmental organizations in this state." (Emphasis added.)

Section 151 was amended in 1943 to contain the present language quoted above.





Mr. Robert J. Dolan

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September 25, 1970

Section 151 provides a comprehensive method for fixing of compensations of all officers and employees of the City and County, except those subject to Section 151.3 of the Charter.

The phrase "in this state" is used in two places in Section 151 with respect to the salary investigation and survey which results in a recommended schedule of compensations to the Board of Supervisors. In addition to the above quoted provision containing "in this state" that phrase is used in the following provision of Section 151:

"The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state; . . ." (Emphasis added.)

In my opinion, a reasonable interpretation of Section 151 is that the Civil Service Commission must present a proposed schedule of compensations to the Board of Supervisors, which schedule is based on a "comprehensive investigation and survey" of private employment and governmental agencies throughout the State of California. A comprehensive investigation and survey contemplates a review of all private and governmental employers in this state which have employments comparable to the classifications in the city and county service. This interpretation appears consistent with the intent of Section 151 of the Charter inasmuch as the salary data for many city and county classifications can be obtained only by surveying comparable private and public employment in regions of the state outside of the San Francisco Bay Area. The City and County of San Francisco, having the combined activities of both a city and a county, must necessarily seek comparable data from cities and from counties which have similar employments and services in order that a prevailing rate may be recommended to the Board of Supervisors. For example, the Civil Service Commission obtains salary data from the Los Angeles Water and Power District since it alone has comparable employments to some of the classifications in the public utility classes in the city and county service. The same is true with respect to some airport classifications wherein the County of Los Angeles operates a large metropolitan airport comparable to the city's facility. The city and county further obtains salary data from the City of Los Angeles, the Los Angeles School District, the San Diego School District and other large



Mr. Robert J. Dolan

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September 25, 1970

school districts in the southern California area because such are considered to provide comparable services as those provided in San Francisco. Data is obtained outside the San Francisco Bay Area to arrive at a prevailing wage rate for other city and county classifications wherein there is no public or governmental agency in the immediate San Francisco Bay Area which has a similar or related classification from which a recommended salary rate may be obtained.

It is my opinion that a salary survey which is limited to the San Francisco Bay Area and its vicinity would not result in a schedule of compensations which would be in accord with the prevailing rate of wages in private employment and governmental agencies "in this state" and would thus violate the requirements of Section 151 of the Charter. It appears clear that Section 151 of the Charter requires the civil service to make a comprehensive investigation and survey of private employment and governmental agencies throughout this state in order that a generally prevailing rate for those employments may be obtained and recommended to the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



September 28, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 341-70; Legality of Rent  
Controls by Ordinance

Dear Mr. Dolan:

This is in response to your letter requesting my opinion as to the current legality of rent control legislation for the City and County of San Francisco by the Board of Supervisors. Specifically, it was asked whether there have been any changes in law or court decisions that would modify or overrule what was stated in Opinion Nos. 4007 of September 17, 1947, 683 of March 27, 1953, and 707 of June 24, 1953.

I delayed this response to the letter because of the pendency in the 1970 session of the State Legislature of Assembly Bill No. 2494 which had as its objective state preemption of the rent control field by adding Section 1940 to the Civil Code which would have read as follows:

"1940. (a) The lessor and the lessee of real property may agree between themselves upon the amount of rent for such real property unless otherwise provided by state law.

"(b) It is the intention of the Legislature, by the enactment of this section as well as by previous enactments of provisions of the codes, relative to the landlord and tenant relationship, to occupy the whole field of regulation of rental rates for real property in the state so as to preclude any local regulation, including that by chartered city or city and county, in the field.



Mr. Robert J. Dolan

2

September 28, 1970

"(c) Nothing in this section shall prohibit the use of arbitration or negotiation procedures to consider disputes between individual lessors and lessees concerning rental rates.

"(d) As used in this section, 'lessor' includes 'landlord'; and 'lessee' includes 'tenant.'"

AB 2494 was not enacted at the 1970 session and I can find no changes in law or court decisions that would warrant modifying or overruling the above mentioned opinions of the City Attorney on this subject.

You are accordingly advised, as the Board of Supervisors was advised in Opinion Nos. 4007 and 683, that if current rental charges have created an emergency situation in San Francisco requiring legislation necessary for the preservation of the public peace, property, health or safety, the Board of Supervisors in the exercise of the police power of the city and county can enact such legislation as they find necessary to cope with the problem.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





September 28, 1970

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Mr. Edmund J. Walsh, Actuary  
San Francisco City and County  
Employees' Retirement System  
450 McAllister Street  
San Francisco, California 94102

Subject: Social Security Coverage for San  
Francisco Community College

Dear Mr. Walsh:

This is in reply to your letter dated September 22, 1970, requesting my opinion as to whether it is necessary that the Board of Supervisors adopt a resolution in order to initiate division procedures in connection with providing Social Security coverage for employees of the San Francisco Community College District.

The function of the division procedures is to divide those employees of the San Francisco Community College District who are members of the Retirement System into two groups: (1) those who desire Social Security coverage and (2) those who do not desire such coverage. Such division is authorized by the Social Security Act (42 U.S.C.A. §418) and is governed by provisions of the Government Code (§§22500, et seq.) and rules and regulations adopted by the Board of Administration of the Public Employees' Retirement System (2 Cal.Admin.Code §§593, et seq.).

One of the required steps in the division procedure is the adoption of a resolution by the "governing body" of the public agency involved. (2 Cal.Admin.Code §598.62.) The public agency involved here is the San Francisco Community College District, which is a governmental agency totally separate and distinct from the City and County of San Francisco. (Gould v. Richmond School District, 58 C.A.2d 497.) The governing body of the San Francisco Community College District is the Board of Education of the San Francisco Unified School District. (Education Code §25451.3.)



Mr. Edmund J. Walsh

2

September 28, 1970

Based upon the foregoing, it is my conclusion that the resolution initiating division procedures need be adopted only by the Board of Education in its capacity as the governing body of the San Francisco Community College District. It is not necessary that the Board of Supervisors adopt such a resolution.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



October 23, 1970

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Mr. R. Spencer Steele  
Zoning Administrator  
100 Larkin Street, Civic Center  
San Francisco, California 94102

Subject: Building Permit Application No. 380753 -  
894 Broadway re Change in Non-conforming Use

Dear Mr. Steele:

This is in reply to your letter requesting my opinion as to whether or not the Department of City Planning should approve a building permit application for the above address in compliance with the Board of Permit Appeals decision.

The Department of City Planning disapproved the application on the grounds that such approval would allow a C-2 non-conforming use to be converted to an M-1 non-conforming use which would be in violation of the City Planning Code.

On appeal, the Board of Permit Appeals reversed the decision of the Department of City Planning and stated:

"The Board finds that the proposed use of the simple sewing machine is far less restrictive than a two-ton printing press. As such, the Board grants the appeal on the basis that the non-conformity is not being changed by the proposed use, and may remain until 1980." (See Board of Permit Appeals, Findings of Fact.)

The structure in question is located in an R-4 High Density Multiple Residential zoning district and houses a printing shop which is classified as a C-2, non-conforming use. (See City Planning Code, §222(h) and §§150 and 154.)

The application, if approved, would allow the printing shop to be replaced in the structure by a garment shop. The City Planning Code classifies a garment shop as "light manufacturing"



Mr. R. Spencer Steele

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October 23, 1970

and first permits such use in an M-1 or "light industrial" area. (See City Planning Code, §226(d) and §210.5.)

Section 151(e) of the City Planning Code covering the topic of changing non-conforming uses states:

"Within the limitations of this section, a non-conforming use may be changed to a use of the same or of a more restricted character, but may not thereafter be changed to any less restricted use." (Emphasis added.)

Section 102.5 of the City Planning Code states as follows:

"District. A portion of the territory of the City within which certain regulations and requirements or various combinations thereof apply under the provisions of this Code. The term 'R district' shall mean any R-1-D, R-1, R-2, R-3, R-3.5, R-4, R-5, or Residential-Commercial Combining district. The term 'C district' shall mean any C-1, C-2, C-3 or C-M district. The term 'C-3 district' shall mean any C-3-0, C-3-R, C-3-G or C-3-S district. The term 'M district' shall mean any M-1 or M-2 district. Each district shall be deemed to be less restricted than the districts which precede it in Section 104, except that such order shall not necessarily apply to the Residential-Commercial Combining districts or among the various C-3 districts. A less restricted use shall mean a use first permitted as a principal use in a less restricted district." (Emphasis added.)

Section 104 of the Planning Code referred to above lists the various districts in the same order as indicated in section 102.5 just quoted. Sections 213 through 227 of the City Planning Code refer to uses permitted, not permitted and conditionally permitted in C and M districts and the order of districts from C-1 through M-2 is identical to that found in sections 102.5 and 104 of the Code.

In examining section 222 of the City Planning Code, it is evident that a printing shop is first permitted as a principal use in a C-2 district. In examining section 226 of the same Code, it is evident that a "light manufacturing" shop is first permitted as a principal use in an M-1 district.





Mr. R. Spencer Steele

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October 23, 1970

Analyzing the above set of facts in light of the language contained in section 102.5, it is apparent that a principal use in an M-1 district is less restrictive than a principal use in a C-2 district which precedes the M-1 district in the Code.

Both of the uses in question are non-conforming uses in an R-4 district. However, pursuant to section 151(e) of the City Planning Code, a non-conforming use may be changed to another non-conforming use only if the subsequent use is of the "same or more restricted character."

In view of the aforementioned provisions of the Code, it is my opinion that a garment shop use is a less restricted use than that of a printing shop within the meaning of the Code and as such, the proposed change in question is expressly prohibited by the Code.

The Board of Permit Appeals in rendering a decision is controlled by the same body of law as is applicable to the lower authority from which the appeal is taken. (See City and County of San Francisco v. Superior Court, 53 Cal.2d 236, 250.)

Based upon the above analysis, it is my opinion that, in this case, the Zoning Administrator acted properly in denying the application for the building permit in question and that said permit should not be issued as ordered by the Board of Permit Appeals.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



October 29, 1970

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Emergency Hospital Physician  
Contract with Health Department  
for Laboratory Services

Dear Dr. Curry:

This is in response to your letter of September 21, 1970, concerning the question of a possible conflict of interest of a Department of Public Health physician who intends to contract with that department for additional laboratory services.

City and County of San Francisco Charter, Section 222, Paragraph 1, provides in part that:

"No . . . employee of the city and county, shall be or become, directly or indirectly, interested in, or in the performance of, any contract, work or business, . . . consideration of or which is payable from the treasury; . . . nor shall any person . . . elected or appointed, acquire an interest in any contract with, or work done for, the city and county, or any department or officer thereof, . . ."

The provisions of Section 222 are qualified by Section 222.1 of the Charter which provides in part that an employee shall not be deemed interested in a contract within the meaning of Section 222:

" . . . unless such contract, work, business or sale is awarded, entered into, or authorized by him in his capacity as an . . . employee . . ."

From the information you provided, it is assumed that the physician is not in a position to effect the award of the contract

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Francis J. Curry, M.D.

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to himself and, of course, there is nothing to suggest the use of any undue influence to effect the award of a contract.

In light of the above, it is concluded that the physician here is not "interested" in the contract as provided by the first paragraph of Section 222.

The second paragraph of Section 222 recites another ground for a possible disqualification from contracting with the City. This paragraph provides in part:

"No . . . employee of the city and county shall engage in any activity, employment or business or professional work or enterprise which is inconsistent, incompatible, or in conflict with his duties as . . . employee of the city and county or with the duties, functions and responsibilities of his appointing power, or the department, office or agency by which he is employed, . . ."

What in fact constitutes conflict of interest would, of course, depend on the circumstances. This issue was discussed at length in Opinion No. 1050 dated February 9, 1956, where it was concluded that each case would, of necessity, be determined on its own particular facts. There is no set definition either in law or in the cases which would define for all circumstances what constitutes a conflict. As was mentioned in Opinion No. 1446, dated June 13, 1960, the purpose of Section 222 was to adopt the common law rule that public employees cannot serve two masters representing adverse or inconsistent interests.

Under the brief circumstances that you provide there would seem to be no conflict of interest if the duties the employee is now performing are unrelated to the duties for which he is contracting and he is not in a position to gain advantage under the contract by reason of his employment. As you are more familiar with the actual duties now performed and those anticipated by the contract, you would be in a better position to determine whether there is any conflict under the circumstances, using as a guideline the principles above mentioned.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 2, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Delinquency Prevention Commission;  
Removal From Office of Member Failing to  
Attend Meetings Thereof

Dear Mr. Dolan:

This is in response to your recent letter wherein you advise that the Delinquency Prevention Commission has asked for approval by your board of their proposed rule providing that any member of the commission absenting himself from two consecutive meetings without notice will receive a request for attendance at the next meeting or be removed from office by the Board of Supervisors. This matter has been referred to the Social Services Committee and said committee has asked that, if it is within the province of the board, I prepare appropriate legislation for further consideration by the Board of Supervisors.

The Delinquency Prevention Commission was created by the Board of Supervisors pursuant to authority granted it by the provisions of Section 535.5 of the Welfare and Institutions Code (San Francisco Admin. Code, §§20.50 - 20.52, incl.), and, accordingly, its activities and procedures are governed by the provisions of State law rather than by the provisions of the Charter of the City and County. With respect to membership of said commission, Section 535.5 provides, in part: ". . . Members of the commission shall be appointed by the board of supervisors to serve a term of four years. . . . Upon a vacancy occurring in the membership in the commission and upon the expiration in the term of office of any member, a successor shall be appointed by the board of supervisors. When a vacancy occurs for any reason other than the expiration of a term of office, the appointee to fill such vacancy shall hold office for the unexpired term of his predecessor." There is no specific provision in the enabling legislation with reference to the removal of members of the commission.







Mr. Robert J. Dolan

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However, general law sets forth certain events causing a vacancy in a public office and certain grounds for forfeiture of or removal from public office. (Gov. Code, §§1770, 3000, 3001, 3060 - 3072, incl.) Among the statutory events causing a vacancy in public office is: failure of the incumbent to discharge the duties of his office for a period of three consecutive months, except when prevented by sickness or when absent from the State with the permission required by law. (Gov. Code, §1770(g).)

The law is well established that an administrative body, such as the Delinquency Prevention Commission, which has no power under law to remove an officer during the term for which he was elected or appointed, may not confer such power upon itself by its own bylaws. (Wall v. Board of Directors, 145 Cal. 468.)

In view of the foregoing, it is my opinion that the commission is without authority to adopt the proposed rule and the board is without authority to approve the same. However, it does appear that the provisions of Section 1770(g) of the Government Code, supra, substantially achieve the objective of the commission, thus obviating the necessity for local legislation.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 4, 1970

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Honorable John A. Ertola  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Status of "Piggyback Parking System"  
Under Provisions of Planning Code

Dear Supervisor Ertola:

This is in response to your letter requesting my opinion as to whether or not a "piggyback parking system" is properly classified as a parking garage under the provisions of the Planning Code.

A parking garage which is not fully enclosed requires conditional use authorization in a C-2 district. A parking lot is a principal use in a C-2 district. The San Francisco Planning Code does not contain a definition which specifically refers to a piggyback parking type operation. The Zoning Administrator, when reviewing a recent application, determined that the piggyback parking system most closely resembled Planning Code provisions relating to an open parking garage giving as reasons that a mechanical lift auto parking unit must be fixed to the ground and results in more than one level of parking.

Section 102.20 of the Planning Code defines a "parking lot" and states in pertinent part as follows: "An off-street open area or portion thereof solely for the parking of passenger automobiles. . . ." Section 102.3 of the Planning Code defines a "building" as "any structure having a roof supported by columns or walls." The information attached to your request indicates that piggyback parking operations do not involve the construction of a building. The parking facilities consist of machinery which makes it possible for one automobile to be parked or stored on top of another. No roofs, columns or walls are involved in the construction of a piggyback parking system and the cars involved are actually parked in open areas.



Honorable John A. Ertola

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Based upon the above code provisions and the physical nature of equipment utilized in a "piggyback parking system" a valid and legal conclusion would appear to be that the appropriate classification would be that of a "parking lot" because such a system does not utilize any structure which would be considered a "building" and the operation is conducted in an "off-street open area . . . solely for the parking of passenger automobiles." Also, although the Zoning Administrator has the power "consistent with the expressed standards, purposes and intent" of the code to make such interpretations as are in his opinion necessary to administer or enhance the provisions of the code (Planning Code §307a), this power cannot be used to negate express provisions.

I recommend that you refer the matter to the Zoning Administrator and the Planning Commission for appropriate legislation to classify this operation with particularity under the district provisions of the Planning Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 5, 1970

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Board of Permit Appeals  
Room 227 City Hall  
San Francisco, California 94102

Attention: Mr. Philip Siggins  
Executive Director

Subject: Board of Permit Appeals No. 5820  
Hebrew Academy of San Francisco;  
Board of Permit Appeals No. 5822  
French American Bilingual School;  
Re Group C School Occupancy in  
Certain Buildings

Gentlemen:

This is in response to your inquiry of September 29, 1970, concerning Appeal #5820 (Hebrew Academy of San Francisco at 766-768 - 26th Avenue) and Appeal #5822 (French American Bilingual School at 973-975 Grove Street) and involving the provisions of Title 19 of the California Administrative Code - Public Safety, and in particular the fire and panic safety standards, and the San Francisco Building Code. Section 1.13 of Title 19 recognizes the validity of local standards and ordinances, provided they are not less stringent than the minimum standards of the California Administrative Code.

Both buildings are Type 5-N; that is, wood frame buildings constructed of nonfireproof materials. The parties intend to use the buildings for Group C school occupancy.

APPEAL NO. 5820

In your letter you state:

"Appeal 5820 involves a two-story wood frame Type 5 building non fire rated. It was a two family dwelling, more commonly referred to as a





set of flats. The owner changed the occupancy from occupancy group 1, two family dwelling, to an occupancy group C, school occupancy. The proposed school use is for the basement or garage floor and that floor immediately above, and living quarters on the top floor. At least this was the original request. However, at the hearing it was indicated by the owner that he also proposed to use this top floor as a group C school use.

"Since the question before the Board is one of interpretation of the State Code Title 19 and the San Francisco Building and Fire Codes, the Board request your opinion in this question of law."

The questions are as follows:

- (1) Under Title 19, is this ground floor or garage floor considered as floor No. 1 in the determination of the requirements for school use in successive floors?
- (2) It appears that Title 19 would allow two floors of school occupancy if the building is either one hour fire protected throughout or a full sprinklering system is provided. Would two floors of school use be allowed in this 3-story wood frame building (if in fact the garage or first floor is counted) with just sprinklering or one hour, or must a three-story wood frame structure be one hour plus sprinklering for the minimal use of two floors of school occupancy?
- (3) If this building is considered as a 3-story building, can the Board consider this as a two-story building by simply abandoning or shutting off that top floor?
- (4) Does this change of occupancy require compliance with the Field Act?
- (5) Is it true that under the San Francisco Building Code school use is permitted in a 1-story Type 5



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nonrated building and that in a 2-story Type 5 nonrated building, in order for the second story to be also used for school purposes, either a 1-hour rated material or a full sprinkling system be installed?

- (6) Since the subject building is a 3-story Type 5N building, in order for the first two stories to be utilized for a Group C use and the third story to be used for a less restrictive use, would the entire building require 1-hour rated material plus a supervised sprinkling system to be installed?
- (7) May the Board consider the building a 2-story structure if the third floor is abandoned, thereby bringing the building within the scope of statutory provisions governing two stories?

My answers to the questions are as follows:

- (1) Under Title 19, is this ground floor or garage floor considered as floor No. 1 in the determination of the requirements for school use in successive floors?

Title 19, Section 4.20(k) defines "story":

"(k) Story is that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a basement or cellar is more than six feet (6') above grade such basement or cellar shall be considered a story."

Therefore, if the finished floor directly above the basement or garage is more than six feet (6') above grade, such basement or garage shall be considered a story. That is, it would be considered floor No. 1 in the determination of the requirements for school use in successive floors.

- (2) It appears that Title 19 would allow two floors of school occupancy if the building is either one



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hour fire protected throughout or a full sprinklering system is provided. Would two floors of school use be allowed in this 3-story wood frame building (if in fact the garage or first floor is counted) with just sprinklering or one hour, or must a three-story wood frame structure be one hour plus sprinklering for the minimal use of two floors of school occupancy?

This question is answered by looking to the terms of Table 5-D of Title 19 under the heading Maximum Height of Buildings and Maximum Height in Stories. Table 5-D provides that a Type 5-N building in which a Group C occupancy is intended may be only one story high. If 1-hour rated material is installed throughout, the building may be two stories high. Section 5.07 provides:

" 5.07. Maximum Height of Buildings and Increases. The maximum height and number of stories of every building shall be dependent upon the character of the occupancy and the type of construction and shall not exceed the limits set forth in Table No. 5-D, except as provided in this Section. The height shall be measured from the highest adjoining sidewalk or ground surface, provided that the height measured from the lowest adjoining surface shall not exceed such maximum height by more than ten feet (10').

"The limits set forth in Table No. 5-D may be increased by one story if the building is provided with an automatic fire extinguishing system throughout installed in accordance with the provisions of Article 38. The increase in height for sprinklers shall not apply when other provisions of these regulations require automatic fire-extinguishing systems throughout or when the increases under Section 5.06(c) are used."

This section would allow a class C occupancy in a 3-story building provided an automatic fire extinguishing system is installed throughout. Therefore, my answer to your question is both an automatic fire extinguishing system and a 1-hour rated construction material are required by Title 19 so as to allow two stories of Group C occupancy in a 3-story building.



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- (3) If this building is considered as a 3-story building, can the Board consider this as a two-story building by simply abandoning or shutting off that top floor?

Section 2.01 of Title 19 provides:

"2.01. Request for Alternate Means of Protection. The provisions of these regulations are not intended to prevent the use of any material or method of construction not specifically prescribed by these regulations when such alternate means of protection is approved by the inspection authority, provided any such alternate is at least equivalent of that prescribed in quality, strength, effectiveness, fire-resistance, durability and safety.

"Request for approval to use an alternate means of protection shall be made in writing by the owner or his authorized representatives and shall be accompanied by a full statement of the conditions. Any request approved under these provisions by the State Fire Marshal may be subject to concurrence by the local fire authority.

"Approval of a request for an alternate means of protection made pursuant to these provisions shall be limited to the particular case covered by the request."

Thus, if the Board concludes on the basis of substantial evidence, with full consideration given to the expert testimony of the Bureau of Building Inspection and Bureau of Fire Prevention, that the suggested alternate means of protection is at least equivalent to the code standards in terms of quality, strength, effectiveness, fire resistance, durability and safety, then the Board thereby may consider the building as a two-story structure.

- (4) Does this change of occupancy require compliance with the Field Act?

In my opinion, it does not. Section 15451 of the Education Code is written in terms of the supervision of the construction







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of any "school building." Section 15452 in defining "school building" provides:

"'School building' as used in this article (commencing at Section 15451) means and includes any building used, or designed to be used, for elementary or secondary schools or junior college purposes and constructed, reconstructed, altered, or added to, by the State or by any city or city and county, or by any political subdivision, or by any school district of any kind within the State, or by the United States Government, or any agency thereof."

This definition excludes private school buildings such as those owned by the appellants in the instant cases.

- (5) Is it true that under the San Francisco Building Code school use is permitted in a 1-story Type 5 nonrated building and that in a 2-story Type 5 nonrated building, in order for the second story to be also used for school purposes, either a 1-hour rated material or a full sprinkling system be installed?

A school use is permitted in a 1-story Type 5-N building. This statement is based on Tables 5-D and 5-E. Before a C use may be used in a second story, a supervised sprinkling system or 1-hour rated material must be installed. The authority for this conclusion lies in Tables 5-D and 5-E, Sections 507 and 106.

- (6) Since the subject building is a 3-story Type 5-N building, in order for the first two stories to be utilized for a Group C use and the third story to be used for a less restrictive use, would the entire building require 1-hour rated material plus a supervised sprinkling system to be installed?

The first question to be determined by the Board is whether this is a 3-story building under the provisions of the San Francisco Building Code. Section 402.19.20 of the Building Code defines a story as follows:

"Story. Story is that portion of a building included between the upper surface of any floor and



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the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above."

Section 507 provides in part:

" . . . The number of stories does not include a basement or cellar not designed for occupancy."

You stated in your letter " . . . The proposed school use is for the basement or garage floor. . . . " Thus it appears that this area is "designed for occupancy" and therefore is a story. However, Section 802A provides in part:

"Basements and cellars may be used for Group C occupancies in Type 1 and 2A buildings under the following conditions:

- "1. In cellars; provided the cellar has a complete supervised automatic sprinkler system and the total number of occupants in cellar classrooms and laboratory areas does not exceed 100. Emergency standby power shall be provided for the lighting, in the corridors and ways of departure lights.
- "2. In basements; provided that windows are furnished in each class-room, not less than 24 inches in the least dimension equal to not less than 5 per cent of the floor area of the room; an automatic sprinkler system shall be provided; and the number of occupants of classrooms and laboratory areas does not exceed 300."

By implication therefore, the code prohibits a Group C occupancy in a basement in a Type 5 building. Therefore, you must determine whether this area is indeed a "basement" within the meaning of the Building Code. Section 402.2.1 of the Building Code provides:

"Basement. Any portion of a building having a floor partly below ground level and not more than



2 feet below the level of the actual adjoining ground, and having a ceiling no part of which is less than 7 feet above such actual ground levels. That portion of a building having a floor above actual adjoining ground and on the same floor level as defined above, may be exempt from being considered a basement provided the portion not a basement is separated from said entire basement portion by walls or partitions to provide a minimum of 3 feet for the basement portion. For basement garage definition, see Section 1002.B."

Section 1002.B defines a basement garage as follows:

"A basement garage is a garage located below adjacent grade such that more than 50% of the perimeter of the garage floor is more than 18 inches below the grade at the point of entry into the garage."

Thus, if this area constitutes a "basement" within the definitions of the Building Code, no Group C occupancy may appear therein. Thus, the owner's intention to use the area for classrooms shall not be allowed if you conclude the area is a basement.

If the owner intends to use the first two stories for Group C use, and if you conclude that this is permissible in light of the above discussion covering basements, and if he intends to use the third story in some less restrictive manner, then it is my opinion that Tables 5-D and 5-E, along with Section 507 would require both 1-hour rated material and a supervised sprinkling system be installed.

The San Francisco Building Code, being more restrictive in permitting Group C occupancies in basements, would govern. Furthermore, the Building Code requiring a supervised sprinkling system is more restrictive than the State law which allows an automatic system and therefore would govern.

You state: " . . . So it appears to us that under the San Francisco Building Code, the third floor of this building is prohibited for Class C occupancy." Whether or not this conclusion is proper depends on the location of what you term to be the "basement or garage floor" in this structure. If this "basement" is below grade and indeed, if the next floor above is





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even with grade, then you could have Group C occupancy on the top two floors provided there is 1-hour construction and a supervised sprinkling system. Table 5-E, which governs this matter, speaks of number of stories from grade. If, on the other hand, the basement or garage is at grade, then you are correct, there may be no Group C occupancy on the third or top floor.

- (7) May the Board consider the building a 2-story structure if the third floor is abandoned, thereby bringing the building within the scope of statutory provisions governing two stories?

Section 106 of the Building Code provides:

"Sec. 106. Alternate Materials and Methods of Construction. It is the declared intention of this Code to define minimum standards of construction which shall produce safe structures. No provisions of this Code are intended to prevent the use of any material, appliance, installation, device, arrangement, or method of construction not specifically prescribed herein, provided such alternate has been approved.

"The Superintendent may approve any such alternate if he finds that the proposed design satisfies structural and other Code requirements and that the material, appliance, installation, device, arrangement, method of work offered is, for the purpose intended, obviously equivalent or better in quality, strength, effectiveness, fire resistance, durability, safety, and for the protection of life and health, than that called for by provisions of this Code.

"The Superintendent may require that sufficient technical data be furnished to substantiate any claims made by the applicant in regard to the use of any such alternate."

Thus, if you conclude on the basis of substantial evidence with full consideration given to the expert testimony of the Bureau of Building Inspection and Bureau of Fire Prevention that this





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alternative arrangement is equivalent in quality, strength, effectiveness, fire resistiveness, durability, safety, and for the protection of life and health to the safeguards in a normal 2-story structure, then you may consider the building a 2-story structure if the third story is closed off.

APPEAL NO. 5822

In your letter you state: "The second appeal, No. 5822, is somewhat similar in that it involves a Type 5 wood frame nonrated two-story and basement two-family dwelling located at 973-975 Grove Street. The owner here also wishes to change the occupancy to a C school occupancy on the first floor with a dwelling unit (I) occupancy on the second floor."

In this case the owner wishes to change the occupancy to a Group C school occupancy on the first floor with a dwelling unit (I occupancy) on the second floor and with no occupancy in the basement. You ask three questions.

- (1) Under Title 19 would this building, a two-story with basement, be classified as a three-story building?

To determine whether this is a 2-story or a 3-story building under Title 19, you are referred to my answer to question No. 1 discussed above. Also, in determining whether this is a 2-story or a 3-story building under the provisions of the San Francisco Building Code, you are referred to my answer to question No. 6 above.

- (2) As a three-story building (if in fact it is), would the provisions of Title 19 require both one hour construction and a complete sprinklering system before a school use is permitted on even one floor?

In my opinion the answer to your question is in the affirmative. The San Francisco Building Code requirement of a supervised sprinkling system would also apply. You are referred to my answer to Question No. 2 discussed above.

- (3) Does Title 19 or the San Francisco Building Code prohibit even one floor of school occupancy in this building?



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As the building stands, no Group C occupancy may be located in it whether the building is two or three stories. Table 5-D and Section 5.07 appearing in Title 19 and Table 5-D and Section 507 appearing in the San Francisco Building Code compel this conclusion. However, as to what measures you may adopt or alterations you may require to be made in order to accommodate a Group C occupancy in this building, I refer you to my discussion of Title 19 in response to Question No. 2 and to my discussion of the San Francisco Building Code in response to Question No. 5.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 9, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Resolution Recognizing San Francisco  
Police Officers' Association as the  
Sole Bargaining Agent for the San  
Francisco Police Department

Dear Mr. Dolan:

Attached for your information is a copy of a letter to the Mayor dated November 6, 1970, expressing my opinion as to the status of the resolution in question.

In the event that the Legislative and Personnel Committee is called upon to consider a similar resolution, another section of the Meyers-Miliias-Brown Act should, in my opinion, be considered. Section 3507 of the Act states in part:

"A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations (1) for the administration of employer-employee relations under this chapter.  
. . .

"Such rules and regulations may include provisions for . . . (c) recognition of employee organizations. . . ." (Emphasis added.)

The authority of a public agency to adopt rules and regulations is granted in the permissive form, but the office of Legislative Counsel, in an opinion of August 2, 1968, stated:

"We do not think it (section 3507) would be construed to permit a public agency to refuse to enact reasonable rules. . . . Ordinarily 'may'

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Mr. Robert J. Dolan

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is permissive but if the provision or context requires it, that meaning is not required."

If any committee or board of the City and County of San Francisco seeks to confer recognition on an employee organization, it is my opinion that the committee or board should consult in good faith with pertinent employee organizations on the topic of recognition, adopt reasonable rules and regulations governing the recognition procedure, and then grant recognition to the appropriate union or employee organization pursuant to said rules and regulations.

The granting of recognition without complying with the minimum requirements stated above would, in my opinion, be in violation of Section 3507 of the Meyers-Milias-Brown Act.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





November 6, 1970

Honorable Joseph L. Alioto  
Mayor of San Francisco  
200 City Hall  
San Francisco, California 94102

Subject: Resolution Recognizing San Francisco  
Police Officers' Association as the  
Sole Bargaining Agent for the San  
Francisco Police Department

Dear Mayor Alioto:

I have reviewed the resolution in question and, in my opinion, it is inconsistent with the Meyers-Milias-Brown Act in the following respect:

The resolution contains a provision stating:

"Whereas it is necessary and desirable that there be a sole bargaining agency, as more fully described in the Meyers-Milias-Brown Act, . . ."

The Meyers-Milias-Brown Act makes no reference or provision for "sole recognition" of any labor union or employee association. On the contrary, Section 3502 of the Act provides that public employees have the right to join the labor organization of their own choosing for the purpose of representation in employee-employer relations matters.

Section 3506 of the Act provides that the public agency and employee organizations "shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

In the area of labor relations, the term "sole bargaining agency" is generally interpreted to mean the only bargaining agency, or exclusive recognition.



November 6, 1970

Shortly after the passage of the Meyers-Milias-Brown Act, the Office of Legislative Counsel issued an opinion as to whether or not a public agency could provide for exclusive recognition of an employee organization under the provisions of the Act. The opinion states, in part:

"Among the purposes of Chapter 10 as stated in Section 3500, is the providing of a 'uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies.' (Emphasis added.) We believe that a rule or regulation adopted by a public agency which resulted in a refusal to recognize but one of several employee organizations would be contrary to such purposes.

"Thus, in our opinion, a public agency could not provide for exclusive recognition of an employee organization under the provisions of S.B. 1228, as amended."

It is my opinion that the resolution as adopted is in conflict with the Meyers-Milias-Brown Act, in that the designation of the Police Officers' Association as the sole bargaining agency for the sworn personnel of the San Francisco Police Department would preclude policemen who are not members of the POA from being represented by other employee organizations of their own choosing. This would be contrary to the language contained in Section 3502. The resolution would also have the effect of coercing the policemen to belong to the Police Officers' Association if they desired to be represented in the meeting and conferring process with the City and County of San Francisco. This coercive effect is also expressly prohibited by Section 3506 of the Act.

It is further my opinion that the deficiencies in the resolution could be corrected by the substitution of language which is more compatible with the intent and meaning of the Meyers-Milias-Brown Act. Specifically, the use of the term "recognized employee organization" instead of the terms "sole bargaining agency" and "sole bargaining agent" would, in my opinion, provide the results sought in the resolution and be consistent with the provisions of the Meyers-Milias-Brown Act.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 9, 1970

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Business of a Public Laundry -  
Clift Hotel - Providing Laundry  
Service to Another Hotel -  
Permit Therefor Under Section 354  
of Health Code

Dear Doctor Curry:

By contract the Clift Hotel is providing laundry service, consisting of laundering the sheets, towels, tablecloths and similar items, to the Californian Hotel. Consequently, your department after investigation notified the Clift Hotel to cease its laundry service to the Californian or obtain a permit under Section 354 of the Health Code. In response, the Clift Hotel has requested you to withdraw your notice on the ground that it is not engaged in the public laundry business under Section 354 by providing service to one customer. You now request my opinion whether you should recall the notice issued by your department.

Section 354 of the Health Code prohibits, unless a permit is first obtained, any person, firm, or corporation from establishing, maintaining, operating or carrying "on the business of a public laundry or washhouse, where clothes or other articles are cleansed, ironed, washed, starched, marked or sorted for hire or profit, . . . in any building or premises within the limits of the City and County of San Francisco . . . "

With respect to hotels and hospitals, subdivision (e) of Section 354 provides that:

"The provisions of this section shall not apply to hotels, or hospitals maintaining or operating laundries exclusively for the convenience,



Francis J. Curry, M.D.

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November 9, 1970

service or accommodation of the respective guests, patients or employees."

In an analogous situation, your department has been advised that a hospital providing laundry service for hire or profit for a medical group was required to obtain a permit under Section 354. There the hospital rented offices to a medical group practicing apart from the hospital and included laundry services to the medical group as part of the agreement with the group. (See Opinion No. 808, March 23, 1954.)

However, the Clift Hotel contends that use of the term "public" in Section 354 connotes "the idea of an unlimited number of customers" (see Yee Bow v. Cleveland, 40 Ohio C.C.R. 339, 401) and, therefore, Section 354 is not applicable to it since it is providing laundry service to only one customer. But as stated in Askew v. Parker, 151 Cal.App.2d 759, 762:

"The term 'public' is a term of most varied and indefinite connotation, a convertible term, and does not have a fixed or definite meaning. When the word 'public' is employed with its ordinary signification it is in the terms of people; but the word is used variously, and depends for its meaning on the subjects to which it is applied, and must be interpreted in each case according to use and intent."

It is readily apparent that Section 354 is a regulatory ordinance involving public health and safety whose purpose is the protection of the citizens of San Francisco from the dangers which may lurk in unsanitary, ill-equipped and hazardously operated laundry businesses. (Ex Parte Mayner, 65 Cal. 33, 35; McQuillin, Municipal Corporations (3rd Ed.), §26.122, p. 297.) In such a situation the word "public" as used in Section 354 must be given as broad a definition as required to provide the protection to the people of this city which was intended. Therefore, the term "public" should be interpreted by exclusion rather than inclusion; that is, excluded from the application of Section 354 and laundries which are operated only for service to the owner thereof. (See Lucas v. Hesperia Golf & Country Club, 255 Cal. App.2d 241, 249.) That this is a reasonable and proper construction of the section is substantiated by the exception provided in subdivision (c) of Section 354 which is applicable to hospitals and hotels operating a laundry service not as a business but only as incidental to the hotel and hospital business.







Francis J. Curry, M.D.

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November 9, 1970

Moreover, Section 354 itself apparently defines "public laundry or washhouse" as a laundry operated for profit or hire by following those terms by the phrase "where clothes or other articles are cleansed, ironed, washed, starched, marked or sorted for hire or profit."

Accordingly, you are advised that the Clift Hotel in providing laundry service to another hotel is operating a "public laundry or washhouse" and must obtain a permit for such activity under Section 354. Therefore, the notice issued by your department to the Clift Hotel should not be recalled.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

The first part of the letter is devoted to a description of the weather and the state of the sky. The weather is described as being very fine and the sky as being very blue. The second part of the letter is devoted to a description of the landscape and the state of the ground. The landscape is described as being very beautiful and the ground as being very soft.

The third part of the letter is devoted to a description of the people and the state of the society. The people are described as being very happy and the society as being very peaceful. The fourth part of the letter is devoted to a description of the future and the state of the world. The future is described as being very bright and the world as being very good.

Very truly  
yours

November 10, 1970

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Miss Mary B. Connolly, Secretary  
Recreation and Park Commission  
McLaren Lodge, Golden Gate Park  
San Francisco, California 94117

Subject: Installation of Radio Antenna  
on Coit Tower

Dear Miss Connolly:

This letter is in response to your oral request for an opinion as to the authority of the Recreation and Park Commission to approve a request by the Department of Electricity to install an antenna on top of Coit Tower for use by the San Francisco Police Department.

The probate file for the estate of Lillie H. Coit was reviewed. Pursuant to her Will, the balance of her estate was divided into three equal portions, one-third of which was bequeathed to the City and County of San Francisco as follows:

"3rd: The remaining one (1) of said three portions I request and direct my executors hereinafter named to pay over and deliver, in money, to the City and County of San Francisco with the request that the supervisors thereof shall expend the same in an appropriate manner for the purpose of adding to the beauty of said City which I have always loved."

Pursuant to the above direction, a decree of distribution was signed on December 23, 1930, transferring the sum of \$177,000 to the City. Of this sum, \$59,000 was received in cash and the balance in securities. Upon further research it has been determined that approximately \$125,000 of this sum was spent for the construction of Coit Tower.

It is my understanding from your communication that the antenna for the Police Department would be approximately 20 feet



Miss Mary B. Connolly

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November 10, 1970

in height and three inches in diameter to be placed on top of the existing tower.

In addition to the above it must be noted that the Recreation and Park Commission may not permit the building or maintenance or use of any structure on any park except for recreation purposes and each permit shall be subject to approval of the Board of Supervisors by ordinance (Section 42.2 of City Charter). The paraphrasing of Section 42.2, together with the directions from the Will of Lillie H. Coit establish that in order for the Recreation and Park Commission to give its approval to the Department of Electricity to install such an antenna, the Commission would have to specifically find the following:

1. The addition of this antenna to the top of the presently existing Coit Tower would be in accord with the purpose of "adding to the beauty of said City"; and

2. That the addition would be in aid of a recreational purpose.

If these findings cannot be made by the Commission, then permission to erect the antenna must be denied as the Commission is without legal authority to allow the installation of structures that do not aid in a recreational purpose and in this particular case would be against the express wishes of the instructions included within the Last Will and Testament of Lillie H. Coit.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 20, 1970

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Human Rights Commission  
1095 Market Street, Suite 501  
San Francisco, California 94103

Attention: Mr. William Becker, Director

Subject: Noncitizens; Employment in City Service;  
as Law Enforcement Officers; and as  
Police Communications Dispatchers

Dear Mr. Becker:

This is in reply to your request for opinion to clarify the current laws and opinions relating to the employment of non-citizens by the City and County of San Francisco and what is required by the City respecting "intention to become a citizen." You also ask whether noncitizens are eligible for law enforcement positions. In addition to these questions you orally inquired whether noncitizens can be employed as a Class 8238 Police Communications Dispatcher.

This office has written several opinions on the subject of employment of noncitizens in the city and county service (see City Attorney Opinion 69-1, dated January 9, 1969) (Employment of noncitizens under Section 1947 of the Labor Code); Opinion 69-5, dated January 20, 1969 (Noncitizens: Prohibition Against Employment as Police Officers); Opinion 67-47-A, dated August 9, 1967 (Employment of Noncitizens under Federally Supported New Careerists Program); Opinion 66-32-A, dated May 9, 1966 (Participation of Noncitizens in Neighborhood Youth Corps Programs).

The pertinent sections of the Labor Code (§§1940-1947, incl.) governing citizenship requirements for employees of the state, cities and a city and county have been repealed during the recently completed Regular Session of the Legislature (Chapter 653, Laws of 1970 Regular Session). The repeal is effective on November 23, 1970. Accordingly, on that date noncitizens will be eligible for employment by the city and county without the requirement of indicating an intent to become a citizen of the United States, as is now set forth in Section 1947 of the Labor Code.





Human Rights Commission

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November 20, 1970

It should be noted that the state law relating to the employment of aliens on public works (§§1850-1854, incl., Labor Code) has also been repealed by the Legislature (Chapter 652, Laws of 1970 Regular Session) which repeal will be effective November 23, 1970. Prior to this legislative action the State Supreme Court in the case of Purdy and Fitzpatrick v. State of (July 1969) 71 C.2d 566 held that Section 1850 of the Labor Code which prohibits the employment of aliens on public works was unconstitutional.

Even though noncitizens will be eligible for city and county employment, they will still be prohibited from employment as law enforcement officers or in positions requiring the carrying of concealable firearms. Section 12021 of the Penal Code makes it a felony for an alien to own, possess or have under his custody or control any firearm capable of being concealed upon the person. Section 12021 has not been repealed and therefore noncitizens are still prohibited by that section from being employed in any position which requires the employee to carry a concealable firearm. (See City Attorney Opinion 69-5, dated January 20, 1969.)

In addition, citizenship may be required in certain city positions where a federal license or permit is necessary and citizenship is a condition for obtaining such license or permit.

The position 8238 Police Communications Dispatcher is a newly created classification to be filled by civilian employees of the Police Department. The duties of that position do not require the carrying of concealable firearms and for that reason the restriction on employment of aliens as imposed by Section 12021 of the Penal Code is inapplicable.

However, the examination announcement and class specifications for Class 8238 Police Communications Dispatcher provides that appointees shall obtain a third class radiotelephone permit during the probationary period. The permit is issued by the Federal Communications Commission after the candidate successfully passes a written examination (see §§13.21-13.23, Rules and Regulations of the Federal Communications Commission). Applicants for the examination must be citizens or nationals of the United States (§13.5, Rules and Regulations of the Federal Communications Commission).

It is my opinion that under the current examination announcement noncitizens would be ineligible for employment as 8238 Police



Human Rights Commission

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November 20, 1970

Communications Dispatchers in view of the requirement that such employees obtain a third class Radiotelephone permit which can be issued only to citizens or nationals of the United States.

It should be noted, however, that the City and County of San Francisco is licensed by the Federal Communications Commission to operate various public radio systems including police radio communications. The City's license is granted by the Federal Communications Commission under Part 89 of its rules entitled "Public Safety Radio Services." Section 89.163 thereof provides:

"(a) Operation during the course of normal rendition of service--radiotelephone. (1) The following classes of stations transmitting on frequencies above 25 MHz may be operated by an unlicensed person, if authorized to do so by the station licensee: . . ."

The police radio system operates on frequencies above 25 MHz and therefore, under the above quoted provision, the Federal Communications Commission does not require operators to be licensed. In the event that the City determines that a third class radiotelephone permit is unnecessary for the performance of the duties of Police Communications Dispatcher, then noncitizens would be eligible for employment in that position.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 23, 1970

Mr. Lyle J. O'Connell  
Executive Director  
Health Service System  
450 McAllister Street  
San Francisco, California 94102

Subject: Eligibility of Retired Employees to be  
Members of Health Service Board and to  
Vote in Elections for Health Service  
Board Members

Dear Mr. O'Connell:

This is in response to your request for my opinion as to whether retired employees who are beneficiaries under the Health Service System are eligible to be members of the Health Service Board and whether such retired employees are eligible to vote in elections for Health Service Board members.

The Health Service System is established and governed by the provisions of Sections 172.1 and 172.1.15, inclusive, of the Charter. Section 172.1.1 provides that the Health Service Board

" . . . shall consist of seven members as follows: the chairman of the finance committee of the board of supervisors, the city attorney, two members appointed by the mayor one of whom shall be a resident official of an insurance company and the other a doctor of medicine, and three members elected by the members of the system from among their number."

Consequently, only those persons who are "members" of the Health Service System are eligible to hold office as members of the Health Service Board.

Section 172.1 provides that:



Mr. Lyle J. O'Connell

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November 23, 1970

"The members of the system shall consist of all employees, which shall include officers, of the city and county, of the San Francisco Unified School District, and of the Parking Authority of the City and County of San Francisco who are members of the retirement system."

The retirement system referred to is, of course, the San Francisco City and County Employees' Retirement System. Thus, a person may be a member of the Health Service System only if he is also a member of the Retirement System. (See Letter Opinion No. 66-70-A.)

A person's membership in the Retirement System ceases upon his being retired (S.F. Admin. Code, §16.46) and he thereupon becomes a "beneficiary" of the Retirement System (S.F. Admin. Code, §16.29-3). Former employees of the City and County, the Unified School District and the Parking Authority who have retired under the Retirement System are therefore no longer members of the Retirement System and, pursuant to the provisions of Section 172.1, such persons are no longer members of the Health Service System. In this connection, you will note that Section 172.1.1.1 refers to such a retired person as a "former member of the health service system retired under the San Francisco City and County Employees' Retirement System." (Emphasis added.)

Since only persons who are members of both the Retirement System and the Health Service System are eligible to hold office as members of the Health Service Board, retired persons, having ceased to be members of both systems, are clearly ineligible.

Likewise, retired persons are not entitled to vote in elections for members of the Health Service Board. As noted above, Section 172.1.1 provides for the election of three members of the Board "by the members of the system." Having ceased to be members of the Health Service System upon their retirement, retired persons are not entitled to vote in elections for members of the Health Service Board.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney







November 24, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Methadone Treatment; Requiring Addict  
Welfare Recipients to Take Treatment  
as a Condition of Receiving Aid

Dear Mr. Dolan:

This letter is in response to your request for my opinion as to whether the Department of Social Services can require addict welfare recipients to take methadone treatments as a condition for the granting of aid.

Extensive testing of this drug has recognized that it is successful in the treatment of drug addicts. However, conditions for the granting of aid in welfare programs are provided both in the Social Security Act and the implementing Welfare and Institutions Code of the State of California. Faced with the situation of counties and states imposing further conditions additional to indigency and need, the courts have generally refused to allow such provisions and have, in fact, struck many of them down. (See Doe v. Shapiro (1970) 302 F.Supp. 761, appeal dismissed 90 S.Ct. 641.)

As your letter indicates an intent to make methadone a condition for the granting of aid to certain addicts, such provision or policy instituted by City and County of San Francisco would appear to be constitutionally vulnerable.

Realizing that such treatment would be designed to benefit an addict, it is still my belief that a person who fulfills all of the other requirements for receipt of welfare under the present state and federal laws could not be required to submit to methadone as a condition for receipt of aid.

Very truly yours,

THOMAS M. C'CONNOR  
City Attorney



November 24, 1970

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Mr. Elmo Ferrari, President  
The Police Commission  
850 Bryant Street  
San Francisco, California 94103

Subject: Resolution of Police Commission  
Granting Recognition to Police  
Officers' Association for Purposes  
of Collective Bargaining

Dear Mr. Ferrari:

This is in response to your request for my opinion as to whether or not the Police Commission is considered a "public agency" within the meaning of the Meyers-Miliias-Brown Act, and whether or not under the same Act a public agency could "recognize" more than one employee organization.

Section 3500 of the Government Code (Meyers-Miliias-Brown Act) entitled "Purpose of Chapter," states in part:

"It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. . . ." (Emphasis added.)

Section 3501 of the Government Code states in pertinent parts as follows:

" \* \* \*

"(c) Except as otherwise provided in this subdivision, public agency means the State of California, every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service



Mr. Elmo Ferrari

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November 24, 1970

corporation and every town, city, county, city and county and municipal corporation whether incorporated or not and whether chartered or not . . .

"(d) 'public employee' means any person employed by any public agency, . . ." (Emphasis added.)

Section 3501(c) is explicit in enumerating the bodies within this state which are to be considered "public agencies" for the purposes set forth in the Act, and it is evident that boards and commissions of public agencies are covered only to the extent that the public agency itself is covered.

The Police Commission is a commission within the City and County of San Francisco created by the Charter for the purpose of managing the Police Department. Employees assigned to the Commission or working under its jurisdiction are employees of the City and County of San Francisco rather than the Police Commission.

Based upon the above analysis, it is my opinion that for purposes of the Meyers-Millas-Brown Act, "public agency" refers to the public employer, which in this case is the City and County of San Francisco, and does not include directly a commission of a local public entity such as the Police Commission.

Section 3507 of the Government Code states that a public agency may, after consultation in good faith, adopt reasonable rules and regulations to govern various subjects of employee relations, including the recognition procedure. The Act contains no specific restrictions with regard to the number of employee organizations a public agency may recognize. It is my opinion that a public agency could, if it so desired, adopt procedures providing for recognition of more than one employee organization within a unit if the agency consulted in good faith with the employee organizations involved and if the rule or regulation adopted was reasonable under the circumstances.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



November 27, 1970

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Mr. Thad Brown  
Tax Collector  
107 City Hall  
San Francisco, California 94102

Subject: File No. 228-70-1  
San Francisco Parking Tax  
University of California  
in San Francisco

Dear Mr. Brown:

This is in response to your letter of October 7, 1970, requesting my opinion as to whether or not the San Francisco Parking Tax imposes a duty upon the University of California and other exempt nonprofit institutions to act as agent to collect the parking tax from users of their parking facilities.

It is my opinion that the San Francisco Parking Tax, as presently written, does not impose any collection duties upon the United States of America, the State of California, or any political subdivision of either thereof, or upon any person who is beyond the taxing power of the Board of Supervisors.

The obligation to act as collection agent for the parking tax is imposed only upon a "person" as defined in the ordinance, and Section 601(a) of the parking tax ordinance defines "person" so as to exclude expressly "the United States of America, the State of California, and any political subdivision of either thereof upon which the City and County is without power to impose the tax herein provided." Accordingly, the ordinance does not impose upon the United States or the State of California or its tax exempt political subdivisions the obligation to collect the tax from nonexempt users.

In addition, Section 616 of the parking tax ordinance provides in pertinent part:

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Mr. Thad Brown

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November 27, 1970

"This Article shall not apply to any person as to whom . . . it is beyond the power of the Board of Supervisors to impose the tax herein provided."

The above section must be construed to mean that persons beyond the taxing power of the Board of Supervisors are exempt not only from the tax imposed by Article 9 but also from all other provisions in Article 9, including specifically the duty to act as collection agent for the parking tax.

In view of the conclusions set forth above, I have, at your request, prepared an amendment to the parking tax ordinance which, if enacted, will permit the collection of the parking tax by the United States, the State of California, the political subdivisions of either thereof and other persons beyond the taxing power of the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



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November 27, 1970

Mr. Raymond G. Connors, Jr.  
Secretary  
Fire Commission  
260 Golden Gate Avenue  
San Francisco, California 94102

Subject: Power of Fire Commission to  
Recommend Sale or Lease of  
Chief's Residence

Dear Mr. Connors:

This is in reply to your letter of November 13, 1970, wherein you request an opinion whether the Fire Commission can decide that the Chief's residence is surplus to the Fire Department's needs and request it be sold or leased.

The City and County of San Francisco purchased the lot at 870 Bush Street in 1902. On April 7, 1919, the Board of Supervisors " . . . set aside and dedicated (the lot) for the purpose of constructing thereon a residence building for use of the Chief of the Fire Department . . . " (Resolution No. 16671.) On April 11, 1921, the Board ordered construction of the Chief's residence on the lot designated therefor (Bill No. 5728, Ordinance No. 5350). Finally, on March 13, 1922, the building was completed and dedicated as the Fire Chief's residence (Official Journal of Proceedings of the Board of Supervisors, Vol. XVII, p. 249).

There is no indication in the Board of Supervisor's Official Journal of Proceedings that the Chief's residence was officially dedicated as a memorial to Chief Dennis Sullivan, who died during the 1906 fire and earthquake. The only reference of an official nature which indicates the residence is a memorial to Chief Dennis Sullivan is found in the Atlas of Real Estate owned by the City and County of San Francisco (1930). The map-page entitled (Assessor's) "Block No. 274" which illustrates the lot properly belonging to the Fire Department refers to the building thereon and states:



Mr. Raymond G. Connors, Jr.      2

November 27, 1970

"Improvements: Three story Class 'C' residences. Constructed 1922. Cost \$23,966 for use of Fire Chief. The cost of this residence was paid for by private subscription and dedicated to the late Chief Sullivan, who was killed in the earthquake of 1906."

Since there is no evidence to the creation of an official memorial to Chief Sullivan which could be subject to a condition for discontinuance thereof, it appears that any private subscription applied toward the cost of building the Chief's residence took the form of an unconditional gift to the City.

The pertinent provisions of the Charter of the City and County of San Francisco which relate to the power of the City to receive gifts and the Board of Supervisors to dispose of real property are Sections 2, 92 and 93.

Section 2 of the Charter, which authorizes the City to receive gifts, provides, in pertinent part, as follows:

"The City and County of San Francisco may . . . receive bequests, gifts and donations of all kinds of property in fee simple, or in trust for charitable and other purposes, . . ."

Section 92 of the Charter which authorizes the sale of real property belonging to the City, provides in part, as follows:

"Any real property owned by the City and County excepting lands for parks and squares, may be sold on the recommendation of the officer, board or commission in charge of the department responsible for the administration of such property. When the board of supervisors, by ordinance, may authorize such sale and determine that the public interest or necessity demands or will not be inconvenienced by such sale, the Director of Property shall make a preliminary appraisal . . ."

Section 93 of the Charter, which authorizes the lease of City-owned property, provides in part as follows:

"When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the

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Mr. Raymond G. Connors, Jr. 3

November 27, 1970

purposes of the department, the board of supervisors, by ordinance may authorize the lease of such property . . . "

Based on the above, it is my opinion that any funds derived from private subscription which were used to help defray the cost of the Chief's residence were contributed merely as a tribute to Chief Sullivan; that such contributions were, in essence, an unconditional gift to the City; and, that no permanent memorial subject to a condition was intended.

Further, it is my opinion that since the Chief's residence is City-owned real property, the Fire Commission can recommend sale of the residence under Section 92 of the Charter; and, that the Fire Chief may request lease of the residence upon report of supervisors that the residence is not required for the purposes of the department under Section 93 of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





December 1, 1970

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Mr. Loria DiGrazia, President  
Recreation and Park Commission  
McLaren Lodge, Golden Gate Park  
San Francisco, California 94117

Subject: Jurisdiction of Commission to Grant  
Permit for Construction and Operation  
of Basque-Fronton Court on Portion of  
McLaren Park

Dear Mr. DiGrazia:

This is in response to your request for an opinion as to the legal authority of the Recreation and Park Commission to grant a permit to construct and operate a Basque-Fronton Court on a portion of McLaren Park located between Geneva Avenue and Sunnydale Avenue. It would appear from the use of the word "operate" that the Basque-Fronton Court would be used exclusively by the Basque community.

This office has on prior occasions concluded that park property could not be set aside for exclusive use and control by private persons or groups. See: Opinion No. 90, dated December 14, 1949, Lease to the San Francisco Football League to have exclusive control of Balboa Park; Opinion No. 332, dated February 23, 1951, Use of West End Stables in Golden Gate Park; Opinion No. 456, dated November 2, 1951, Erection of stable by the Equestrian Foundation in Golden Gate Park; Opinion No. 558, dated June 12, 1952, Permission to sublet for nonveteran activities; Opinion No. 618, dated October 20, 1952, Rental of stalls at stables in Golden Gate Park to private horse owners; Opinion No. 1166, dated May 10, 1957, Use of recreation and park facilities for Cooperative Nursery Schools. A subsequent opinion on the use of cooperative schools, dated August 5, 1957, and numbered 1183; Opinion No. 1184, dated August 6, 1957, Use of a portion of Sharp Park for construction of a Boys' Club; Opinion No. 1262, dated May 28, 1958, Permit to construct convenience stations at Sharp Park; Opinion No. 6243, dated August 28, 1962, Tourist and Convention Booth; Opinion No. 6228, dated May 25, 1962, Fire Department Headquarters.



Mr. Loris DiGrazia

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December 1, 1970

These opinions and the authorities therein cited are applicable here and you are accordingly advised that the Recreation and Park Commission does not have the legal authority to permit the Basque community to construct and operate a Basque-Fronton Court on park property.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



December 3, 1970

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Mr. R. Spencer Steele  
Zoning Administrator  
Department of City Planning  
100 Larkin Street  
San Francisco, California 94102

Subject: Jurisdiction of the Department of  
City Planning to Accept and Approve  
a Conditional Use in an R-1-D District

Dear Mr. Steele:

You request an opinion concerning the authority of the Planning Commission to approve the conditional use of a utility installation in an R-1-D District. The application was filed by the Pacific Telephone Company for permission to erect a building and related facilities to be used for office and equipment space to house the company's information operators on Block 2484, Lots 8 and 9, at St. Francis Circle at the east end of Sloat Boulevard located in an R-1-D District (Single-Family Residential Dwelling Detached).

The applicable sections of the City Planning Code are quoted in part as follows:

"SEC. 303. Conditional Uses.

"(a) General. The City Planning Commission shall hear and make determinations regarding applications for the authorization of conditional uses in the specific situations for which such authorization is specified elsewhere in this Code. The procedures for conditional uses shall be as specified in this Section and in Sections 306 through 306.5, except that Planned Unit Developments shall in addition be subject to Section 304.

"(b) Initiation. A conditional use action may be initiated by application of the owner, or authorized agent for the owner, of the property for which the conditional use is sought."



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"SEC. 201.2. Conditional Uses, R-1-D Districts. The following uses shall be subject to approval by the Commission, as provided in Section 303:

" . . .

"(g) Utility installation, public service facility, landing field for aircraft, wireless transmission tower, railroad; provided, that operating requirements necessitate location within the district."

The City Planning Code, specifically Section 303, contemplates that conditional uses will be permitted within certain zoning districts as set forth in the Code. Since the conditional use is authorized by the zoning plan itself, it is entirely different in scope, nature and purpose from the change of a zone brought about by an amendment. See *Essick v. Los Angeles* (1950) 34 Cal.2d 614, 622. The conditional use merely affirms as a fact the existence of circumstances under which the ordinance by its terms prescribes that such use permit shall issue. Such a permit is an administrative permission for a use not allowed as a matter of right in a district in compliance with standards contained in the City Planning Code.

Section 303(a) provides that the City Planning Commission shall hear and make determinations regarding application for the authorization of conditional use where the authorization is specified in the City Planning Code. There is no requirement that a hearing be held by the Zoning Administrator to determine whether or not an application should be accepted or rejected. The Commission has the authority to adopt reasonable rules and regulations concerning the administration of the City Planning Code and you, as Zoning Administrator, have been delegated the authority and duty to enforce the provisions of the City Planning Code. However, any rule or regulation adopted would have to be reasonable within the interpretation of the Planning Code. See Section 306.1(c) wherein the Planning Code authorizes the Zoning Administrator to adopt rules and regulations in accordance with the policies of the City Planning Commission.

In the circumstances you note you have interpreted "operating requirements" to read "technological or equipment operating requirements." As provided in Section 201.2(g) I find nothing





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inconsistent with this interpretation as a matter of law. However, the Commission in its review of the application for a conditional use has the authority to review all facts which necessitate location of a utility installation in a particular location.

Section 303(c) provides in part as follows:

"(c) Determination. After its hearing on the application, the City Planning Commission may approve the application and authorize a conditional use if the facts presented are such as to establish;" (Emphasis added.)

The Commission is authorized by the City Planning Code to consider the use or feature of the proposed location; that such use or feature will not be detrimental to the health, safety, convenience or general welfare of the persons residing or working in the vicinity; the nature of the proposed site; the accessibility and traffic balance; the safeguards afforded to prevent noxious or offensive emissions; and the treatment given in regard to landscaping, open spaces, lighting and signs. In addition, in this particular instance the Commission could consider the availability of personnel to work within the facility, the fact that this public utility serves residents of the City and the need for this facility to meet operating requirements imposed by law since one of the basic elements of a public utility is that it is required to supply its services to all who apply.

As Section 303(c) provides, the City Planning Commission has the authority to approve the application if facts are presented to the Commission which demonstrate that the use is proper in all respects for the site in question. The courts of this state have interpreted the hearing held before an administrative agency such as the Planning Commission in the determination of whether a conditional use should be approved is a quasi-judicial matter which means essentially that facts must be presented pursuant to the standards provided in the Code. In Wheeler v. Gregg, 90 Cal.App.2d 348, 363, the court held as follows:

"The decision to grant a conditional use permit does not create a new zone. It merely affirms as a fact the existence of the circumstances under which the ordinance by its terms prescribes that such permit shall issue."



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The Planning Commission in its review of the facts must give consideration to the availability of other suitable sites for the installation of this building to contain information operators and equipment. In the case of Niagara Mohawk Power Corp. v. City of Fulton, 188 N.Y.S.2d 717, the court in discussing the application of a public utility to install an electric substation, held as follows:

"In determining the reasonable necessity of the use of a particular site, consideration must be given to the availability of other sites and to the degree of detriment to the neighborhood which might be caused by the various sites as weighed against their comparative advantages from the standpoint of efficiency and safety of operation.

" . . .

"A comprehensive zoning ordinance should contain a provision giving the Board of Zoning Appeals the power to grant an exception for the building of necessary public utility structures in restricted districts (cf. Consolidated Edison Co. v. Town of Rye, 16 Misc.2d 284, 182 N.Y.S.2d 688). The question of the propriety of the selection of a particular site would then be passed upon by the local administrative body which is charged with responsibility for the carrying out of a comprehensive community plan."

Further, in the case of Yahnel v. Board of Adjustment of Jamesburg, 185 A.2d 50 (New Jersey), the court reviewed the application by a telephone company for permission to construct a proposed wire center to be located within a residential district. Local residents within the Borough of Jamesburg challenged the granting of an administrative decision by the local Board of Adjustment approving the installation of the telephone company wire center. The court, after reviewing the decision of the local agency, stated that a public utility is required to supply its services to all who apply. The court went on to state that there was affirmative evidence showing that in order to perform this public service the facility proposed to be built by the telephone company would have to be located within a radius of approximately 200 feet of a fixed spot in the Borough of



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Jamesburg, and that since the lot in question came within that area and no other lot was practically available to the applicant, there was no cause to upset the action taken by the local administrative agency.

You are advised, therefore, that pursuant to the provisions of the City Planning Code the City Planning Commission has jurisdiction to hear and determine whether the conditional use as requested by the applicant Telephone Company is proper under the applicable codes. The determination of this question is one of fact to be determined by the evidence submitted to the Commission. The Pacific Telephone Company is a public utility and as such comes within the authorized conditional use in Section 201.2(g) and must be given an opportunity to present evidence to demonstrate the need of this facility at the location designated herein. The Commission in its consideration of the application must consider all factors as outlined above and should exercise a sound discretion on the facts presented.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



December 3, 1970

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San Francisco Zoological Society  
San Francisco Zoo  
Zoo Road & Skyline Blvd.  
San Francisco, California 94132

Attention: Mr. Jay G. Stewart  
General Business Manager

Subject: Authority for Zoological Society  
to Deduct Insurance Premiums From  
Gross Revenue

Gentlemen:

This is in response to your request for an opinion on the interpretation of provisions in the document entitled "Lease and Agreement for Operation of Concessions in San Francisco Zoological Gardens and Fleishhacker Playfield." Your question relates to the authority of the San Francisco Zoological Society to deduct the cost of insurance policies from the gross rental paid to the Recreation and Park Department pursuant to the provisions of the Agreement.

The provision quoted in your letter is not incorporated within the present Lease Agreement. A review of the lease, specifically paragraph 10 entitled "Rental" on pages 11 and 12 defining gross revenue, and paragraph 33 entitled "Direct Damage Insurance" and paragraph 38 entitled "Liability Insurance" reveals a clear intent that the lessee; i.e., the San Francisco Zoological Society agreed at its own cost and expense to maintain all insurance policies required by the Agreement.

Further, the definition of gross receipts or gross revenue allows only a deduction for taxes collected from patrons.

Under the circumstances, since the language of the Agreement is clear and is not subject to interpretation, the provisions of the lease control regarding the payment of insurance







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premiums. You are advised therefore that no ruling by this office could permit the San Francisco Zoological Society to deduct the portions of the premiums chargeable to concession income.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



December 7, 1970

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Legality of Mission Mental Health  
Center Policy Board and Agreement  
with Mission Coalition Organization

Dear Doctor Curry:

Pursuant to an agreement signed by your predecessor there was established a Mission Mental Health Center Policy Board as part of Mission Health Center #1 (Mission) and the Mission Coalition Organization was given the right to appoint two-thirds of the members of the Board. Now you, as well as others, have questioned the propriety of this agreement, as well as the proportion of representation on the Board.

Pursuant to the Short-Doyle Act (Welf. & Inst. Code, §5600 et seq.), the Board of Supervisors established a community mental health service in this city and county and appointed the Director of Public Health as the local director of mental health service (San Francisco Admin. Code, ch. 15) and has also appointed an advisory board composed of thirteen members. The director of mental health service is the "chief executive officer of the community mental health service and shall be responsible to the board of supervisors" and he "shall exercise general supervision over mental health services and facilities furnished, operated or supported as part of the community mental health service in the city and county." He shall "recommend to the board of supervisors, after consultation with the advisory board, the provision of services, establishment of facilities, contracting for services or facilities and other matters necessary or desirable to accomplish the purpose of the community mental health service." (San Francisco Admin. Code, §15.2; Welf. & Inst. Code, §5608.)

There is no provision in the foregoing laws for contracting with citizens' groups and it is, of course, fundamental law

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Francis J. Curry, M.D.

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that no public officer can delegate his public powers and responsibilities to private individuals. I have reviewed the agreement signed by Dr. Sox with the Mission Coalition Organization and it does not appear to me that Dr. Sox has done this. As I interpret the agreement, the Policy Board established by it would merely have advisory and recommendatory functions in the areas covered by the agreement and none of their recommendations are binding on the director. It does not appear to me to be improper or illegal for the director of mental health service to enter into such an understanding with citizen groups with or without a written agreement.

As the agreement has no legal authority either under state law or from the Board of Supervisors, the agreement is not an agreement of the City and County of San Francisco and was merely a personal agreement of Dr. Sox which is not binding upon you as his successor and you are free to follow it, disregard it or enter into a new understanding, if you so desire.

As the Policy Board established in the agreement is not an official body of the City and County of San Francisco in any sense, the one-man one-vote question is not legally pertinent.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



December 9, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Authority of Board of Supervisors to  
Adopt Third Draft of Proposed Ordinance  
Creating the Office of Commissioner for  
Consumer Affairs

Dear Mr. Dolan:

This is in response to your request for an opinion as to the legality of a proposed third draft of an ordinance creating the office of Commissioner for Consumer Affairs by adding Chapter 5A to the San Francisco Administrative Code.

The above proposal which is under consideration by a committee of the Board of Supervisors would establish an Office of Consumer Affairs. The Commissioner would have various duties in regard to consumer education and protection; the enforcement of laws in relation to weights and measures; the enforcement of all laws relating to the advertising and sale of all commodities; he would receive and evaluate complaints; he would represent interest of consumers before administrative and regulatory agencies; he would recommend adoption and amendment of laws for the protection of consumers and encourage business and industry to maintain high standards of honesty.

In addition to the above, the Commissioner is entitled to hold public and private hearings, serve subpoenas, receive evidence and to receive, administer, pay over and distribute moneys collected as a result of actions brought for violation of laws.

The ordinance further provides that the Commissioner would exercise and perform such other functions, powers and duties as may be deemed necessary to protect the welfare of consumers.





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The proposed ordinance, specifically the third draft, cannot be approved since it is beyond the power of the Board of Supervisors to adopt several of the provisions incorporated within it. The following provisions of the ordinance would have to be modified by amendment before the proposed third draft could be adopted by the Board of Supervisors:

The applicable sections are as follows:

"Sec. 5A.2. Powers of the Commissioner.

"(b) The commissioner shall enforce all laws in relation to weight and measures;

"(c) The commissioner shall enforce all laws relating to the advertising and offering for sale and the sale of all commodities, goods, wares and services;"

"(h) The commissioner, in the performance of said functions, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of laws, including those relating to deceptive or unconscionable trade practices or of related laws, and to promulgate, amend and modify procedures and practices governing such proceedings, and to promulgate, amend and modify rules and regulations necessary to carry out the powers and duties of that department;

"(i) The commissioner shall exercise and perform such other functions, powers and duties as may be deemed necessary or appropriate to protect and promote the welfare of the City and County of San Francisco consumers; and . . . "

The Office of the Attorney General in an opinion issued September 17, 1970, concluded that a county sealer of weights and measures cannot be authorized by a county board of supervisors to perform his duties under the title of Director of Consumer Affairs. This conclusion was based upon applicable sections of the Business and Professions Code relating to the office of county sealer of weights and measures. Under these circumstances the language incorporated in 5A.2(b) would in effect



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change the title of the office of Sealer of Weights and Measures to that of Commissioner of Consumer Affairs which the Attorney General has said cannot be done (Opinion of Attorney General 70-108, September 17, 1970).

Subsection 5A.2(c) provides that the Commissioner shall enforce all laws relating to the sale of goods, wares and services without limitation. Pursuant to the Constitution and applicable codes it is the responsibility of the district attorney of each county within this state to enforce the laws relating to specific complaints of fraud. In addition, the State of California has enacted legislation relating to the advertising and sale of commodities, goods, wares and services. For example, the Legislature has enacted a comprehensive scheme for the regulation of television repair and as such has preempted the regulation of this activity by local jurisdictions. The list of applicable statutes, both federal and state, relating to this subject matter is quite extensive and the language provided for in Section 5A.2(c) is far too encompassing in its present format.

Section 5A.2(h) providing for public and private hearings by the Commissioner and the power to administer, pay over and distribute moneys collected in and as a result of actions brought for violations of laws would be an attempt by the Board of Supervisors to create a new court. This cannot be done.

Article 6, Section 1, of the Constitution of the State of California provides as follows:

"Sec. 1. The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts and justice courts. All except justice courts are courts of record."

The courts in review of this constitutional provision have held that the Legislature is without power in the absence of constitutional provision authorizing the same to confer judicial functions upon administrative agencies. See Standard Oil v. State Board of Equalization, 6 C.2d 557, 559-560; In re Keller, 232 C.A. 2d 520.

Further, Section 26 of City's Charter which creates the office of City Attorney provides that the City Attorney must represent the City and County in all actions and proceedings in which it may be legally interested. The phrase "legally interested" as used in this context would mean the representation by



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the City Attorney to protect the City and County as a legal entity or to file actions on behalf of the City and County where a legal wrong exists against the City as an entity. It is axiomatic in California that City's Charter is not a grant of power to enact legislation, but is rather a limitation of power upon the Board of Supervisors to act. Section 26 of City's Charter is a limitation on the power of the Board of Supervisors and as such it has authority to authorize the City Attorney to file actions only on behalf of the City as a legal entity and not on behalf of individual citizens of the City.

Further, Section 82 of City's Charter provides that all moneys received by any officer or employee of the City and County shall be delivered to the Treasurer no later than the next business day after it is received and the disbursement of any funds shall be only on warrants drawn by the Controller pursuant to an applicable appropriation ordinance approved by the Board of Supervisors.

For these reasons the language incorporated in 5A.2(h) cannot be adopted by the Board of Supervisors.

Section 5A.2(i) provides a broad and general delegation of authority without appropriate standards to the Commissioner. The only standard provided is if such function, power or duty is deemed necessary and appropriate. The Board of Supervisors cannot delegate unfettered discretion to any administrative official and what one person may deem necessary or appropriate, another person might question. Standards for performance must be provided on granting authority to an administrative official.

For the reasons expressed I am returning the proposed Third Draft of your File No. 289-69-2 without approval by this office.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

Attach.





December 11, 1970

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Mr. Thad Brown  
Tax Collector  
107 City Hall  
San Francisco, California 94102

Subject: Payroll Expense Tax as Applied  
to Persons Dealing in Alcoholic  
Beverages

Dear Mr. Brown:

This is in response to your letter requesting my opinion as to whether or not the San Francisco Payroll Expense Tax (Ordinance No. 275-70) is validly applicable to persons dealing in alcoholic beverages.

It is my opinion that the San Francisco Payroll Expense Tax is legally applicable to persons dealing in alcoholic beverages, notwithstanding Article XX, Section 22 of the California Constitution and notwithstanding various state statutes, including Revenue and Taxation Code Section 32010 and the Bradley-Burns Local Sales and Use Tax Law.

The San Francisco Payroll Expense Tax (Ordinance No. 275-70) is an excise tax of general application. It is not directed exclusively at persons dealing in alcoholic beverages, but rather is levied upon "every person who, in connection with his business, engages, hires, employs or contracts with individuals . . . to perform work or render services . . . within . . . San Francisco." (Section 3.)

Payroll expense is defined as compensation paid to an individual who performs work or renders services in San Francisco (Section 2.6) and an apportionment is provided for payroll expense attributable to work performed or services rendered in part within and in part outside of San Francisco (Section 4).

The tax is imposed for revenue purposes only, payment of the tax is not a prerequisite to engaging in business, and no license or registration certificate is required (Section 3).

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San Francisco, of course, is a freeholders charter city availing itself of the "home rule" provisions of Article XI, Sections 6 and 8 of the California Constitution. Accordingly, it is well settled that its power to impose taxes for revenue purposes is strictly a municipal affair and as a general rule, such taxes are valid. Ainsworth v. Bryant (1949) 34 Cal.2d 465; Century Plaza Hotel Co. v. Los Angeles (1970) 7 C.A.3d, 616. There are exceptions as follows:

(1) Charter city taxes, of course, are invalid to the extent prohibited by the city charter itself. Ainsworth v. Bryant, supra.

(2) Charter city taxes are invalid to the extent prohibited by state statutes if, upon considering the "predominance or superiority as between general state laws on the one hand and the local regulations on the other," general state laws prevail. Century Plaza Hotel Co. v. Los Angeles (1970) 7 C.A.3d 616.

(3) Charter city taxes are invalid to the extent prohibited by the California Constitution. Los Angeles Brewing Co. v. Los Angeles (1935) 8 Cal. App.2d 381.

1. Insofar as the Charter for the City and County of San Francisco is concerned, the San Francisco Payroll Expense Tax is not in conflict with any of the provisions thereof and the tax cannot be considered invalid on that account.

2. Insofar as state statutes are concerned, the only enactments found which could possibly invalidate the San Francisco Payroll Expense Tax are Revenue and Taxation Code Section 32010 and the Bradley-Burns Local Sales and Use Tax Act.

Revenue and Taxation Code Section 32010, enacted in 1959, reads in pertinent part as follows:

"The taxes imposed by this part are in lieu of all county, municipal, or district taxes on the sale of beer, wine or distilled spirits." (Emphasis added.)

This statute, however, purports to prohibit only taxes on the sale of alcoholic beverages. The San Francisco Payroll



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Expense Tax does not tax either the sale or the purchase and use of alcoholic beverages, nor is the tax measured by sales price.

There simply is no conflict between the San Francisco tax, which is imposed upon persons who employ individuals to perform work in San Francisco, and the state statutes which prohibit only those local taxes imposed on the sale of alcoholic beverages.

Accordingly, the San Francisco Payroll Expense Tax is not invalid by reason of conflict with state statutes because there is no conflict. Even if such a conflict existed, it would appear that, upon considering the "predominance or superiority" between state and local enactments, the local tax ordinance would prevail. See: Century Plaza Hotel Co. v. Los Angeles, supra.

In Century Plaza Hotel Co. v. City of Los Angeles (1920), supra, Revenue and Taxation Code 32010 was held to invalidate by preemption the so-called "Los Angeles Tipplers Tax," which imposed an excise tax of 5 per cent upon the purchase price of alcoholic beverages sold by a retailer for consumption on the premises where sold. The court apparently found that the Los Angeles tax should be classified generically as a sales tax on alcoholic beverages, even though it purported to tax the purchase of alcoholic beverages for consumption on the premises where sold. In effect, the court held that for purposes of Revenue and Taxation Code Section 32010, prohibiting local taxes upon the sale of alcoholic beverages, a tax upon the purchase of alcoholic beverages constituted a tax upon the sale of alcoholic beverages.

The San Francisco Tax, being a payroll expense tax, is entirely different from the tax involved in the Century Plaza case, which was classified generically as a sales tax.

3. Insofar as the California Constitution is concerned, the only provision which possibly could invalidate the San Francisco Payroll Expense Tax, as applied to persons dealing in alcoholic beverages, is Article XX, Section 22, which at present reads in pertinent part as follows:

"The State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State . . . and . . . shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic



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beverages. . . . All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. . . . The Department of Alcoholic Beverage Control shall have the exclusive power . . . to license the manufacture, importation and sale of alcoholic beverages . . . and to collect license fees or occupation taxes on account thereof. . . . The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on the account of the manufacture, importation and sale of alcoholic beverages in this State."

This section was first adopted by initiative in 1932 and acquired its present form by amendments in 1934, 1954 and 1956.

The basic provision of Article XX, Section 22, is the first sentence, which has not changed since 1932, except for the non-substantive substitution throughout in 1956 of the words "alcoholic beverages" for the words "intoxicating liquors." This provision was considered in Los Angeles Brewing Co. v. Los Angeles (1935) 8 C.A.2d 391, wherein Los Angeles had sought to impose a business license tax upon a brewing company by reason of its business of manufacturing and distributing beer and wine within the city. At that time Article XX, Section 22, read as follows:

"The State of California . . . shall have the exclusive right and power to control, license, and regulate the manufacture and sale, purchase, possession, transportation, and distribution of intoxicating liquor within the State. . . ."

The city contended that its license tax was for revenue purposes only and that Article XX, Section 22, was intended to prohibit only licensing for purposes of regulation. The court rejected this contention and held that the state's exclusive licensing power of the liquor business took away from the political subdivisions of the state the right to impose a license tax upon the manufacture, sale, purchase, possession or transportation of liquor.

The above case passed on Article XX, Section 22, as originally enacted in 1932 and as it stood in 1933, when it contained no express reference to taxation.





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In 1934, the section was amended and there was added among other provisions the following:

"The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquor in this State, and to collect license fees or occupation taxes on account thereof. . . . The Legislature shall provide for apportioning the amounts collected for license fees and occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper."

Thereafter, in the case of Three G. Distillery Corp. v. County of Los Angeles, (1941) 46 Cal.App.2d 498, the distillery contended that the purpose of Article XX, Section 22, as amended, was to set up a comprehensive scheme of taxation of intoxicating liquors whereby the state would be the sole taxing agency and the municipalities would share in the receipts of taxation by receiving from the state a portion of the revenue collected by the state. The court expressly rejected this contention, declaring that the state power to license and regulate did not preclude entirely the power of the municipalities to impose taxes. The court upheld the power of the County of Los Angeles to impose personal property taxes upon the ownership of intoxicating liquors.

Subsequently, in Ainsworth v. Bryant (1949) 34 Cal.2d 469, the California Supreme Court again construed Article XX, Section 22 (which had not been changed since the 1934 amendment considered in Three G. Distillery Corp.) to permit a San Francisco excise tax not directed exclusively toward alcoholic beverages. That case involved the validity of the San Francisco Purchase and Use Tax as applied to the purchaser-consumer of intoxicating liquors. It had been contended that Article XX, Section 22, invalidated the San Francisco tax as applied to the sale of intoxicating liquors. The court rejected this contention and upheld the validity of the San Francisco tax. The court found that the San Francisco tax was not levied exclusively upon sales of intoxicating liquors but was applicable to purchase transactions in all lines of retail business, subject to certain exemptions. The court held that the San Francisco tax, though classifiable as a sales tax, did not enter into the field of taxation preempted by the state. The court further held that the San Francisco tax was neither an





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occupation tax nor a license tax despite the requirements of a registration certificate. The court said:

"In the light of these observations, it is manifest that the 'purchase and use tax' here in question, though classifiable as a sales tax, does not, when applied to the sale of intoxicating liquors, enter into the field of taxation preempted by the state commensurate with its 'exclusive power' to levy 'license fees or occupation taxes' thereon. (Const., art. XX, §22.) . . . it is properly denominated in the ordinance as an 'excise tax' as distinguished from a personal property tax. . . . (citations) Adopted purely for revenue purposes, it covers all lines of retail business within the city, and retailers of intoxicating liquors become subject to it, not because they sell that particular commodity but because they sell tangible personal property. Under well-settled legal principles, immunity from such a general taxing measure must be clearly established . . . (citations), and as the 'purchase and use tax' here has been analyzed, such exemption does not appear to be the case with respect to the retailer of intoxicating liquors unless he is to be placed in a different category from other retailers because of the regulatory features of the ordinance."

In my opinion, then, Article XX, Section 22, of the California Constitution, as construed by the courts, does not immunize the liquor industry from local taxes, with this exception: license taxes and occupation taxes levied on account of a licensing requirement are prohibited.

The San Francisco Payroll Expense Tax does not require the taxpayer to obtain a license or registration certificate (§3). Payment of the tax is not a condition precedent to engaging in business (§3). No criminal penalties are imposed for failure to pay the tax (§15). Hence, the San Francisco tax is not a license tax.

Nor is the San Francisco tax an occupation tax levied "on account of" a licensing requirement. In the first place, the San Francisco tax does not contain any licensing requirement (§3) "on account of" which the tax is imposed. In addition:

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ROYAL ANTHROPOLOGICAL INSTITUTE  
Vol. 40, Part 1, 1910. Pp. 1-100.

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"Any distinction between a license tax for revenue and an occupation tax for revenue would seem to be one in name only." McQuillin, Municipal Corporations (3rd Edition Revised) Vol. 9, §26.19; Kaufman v. Tucson (1967) 6 Ariz. App. 429, 433, P.2d 282 [Quoting McQuillin].

Moreover, the California courts have indicated that a tax is not an occupation tax which is imposed only on persons "doing business," but which neither singles out specific businesses nor designates "doing business" as its normal subject. Edward Brown and Sons v. McColgan (1942) 53 C.A.2d 504.

Accordingly, it is my opinion that the San Francisco Payroll Expense Tax, like personal property taxes and real property taxes, may be imposed upon persons whose business wholly, or in part, consists of dealing in alcoholic beverages.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



December 22, 1970

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Legislation Regarding the Licensing  
of Card Rooms

Dear Mr. Dolan:

You have asked on behalf of Supervisor Francois whether licensed card rooms could be allowed in this city.

Under state law, draw poker and draw low ball poker, where not operated as a banking or percentage game, are not prohibited. (See Monterey Club v. Superior Court, 48 Cal.App.2d 147, 146; Remmer v. Municipal Court, 90 Cal.App.2d 854, 856.) However, such games do constitute gambling and are in violation of Section 288 of our Police Code. (See Remmer v. Municipal Court, supra, 90 Cal. App.2d at p. 856.)

With appropriate amendments to Sections 288 and 260 of the Police Code, the playing of said games would be made lawful. Therefore, pursuant to your request, attached hereto for submission to your board is an ordinance providing for the regulation and licensing of card rooms, together with changes to Sections 288 and 260 of the Police Code to eliminate any conflict.

The proposed ordinance leaves blank for insertion by the Board of Supervisors the total number of permits to be allowed in the City (\$350.5), the amount of a nonrefundable application fee (\$350.2), and the amount of the annual license fee (\$248, Part III of the Municipal Code).

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

Enc.

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December 28, 1970

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Human Rights Commission  
1095 Market Street  
San Francisco, California 94103

Attention: Mr. William Dacus  
Coordinator of Employment

Subject: Applicability of Antidiscrimination  
Ordinance to Tenants at San Francisco  
International Airport

Gentlemen:

You have asked whether the provisions of Ordinance No. 261-66, as amended in 1968, are applicable to the individual tenants leasing property at San Francisco International Airport, and if applicable, whether said provisions could be incorporated into existing leases.

Ordinance No. 261-66, as amended, added Chapter 12B to the San Francisco Administrative Code providing that nondiscriminatory employment provisions be included in all City contracts and also authorized the Human Rights Commission to hold hearings and prebid conferences and to establish procedures for development of affirmative action nondiscrimination programs by contractors. More specifically, Section 12B.1 of said code requires that in all contracts and franchises of the City there shall be a provision "obligating the contractor in the performance of such contract not to discriminate on the ground or because of race, color, creed, national origin or ancestry against any employee of, or applicant for employment with, such contractor, and shall require such contractor to include a similar provision in all subcontracts let or awarded thereunder."

With respect to contracts or subcontracts for public works or for the purchase of goods or services Section 12B.2 of said code sets forth more detailed nondiscrimination provisions which are to be a part of each such contract, including the authority





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for the Human Rights Commission to have prebid conferences, to have hearings and determine if contractors are violating the non-discrimination provisions, and to require contractors to have affirmative action nondiscrimination programs.

The individual tenants at San Francisco International Airport obtain their rights to use those facilities by virtue of leases executed between them and the City. While leases have aspects of a contract in creating certain rights and obligations between the parties thereto, such an agreement is generally regarded as a conveyance of an estate in real property for a limited term. (See Dean v. Brown, 119 Cal.App. 412, 415, 30 Cal. Jur.2d, Landlord and Tenant, §26, p. 150.)

Therefore, as Ordinance 261-66, as amended, by its own terms limits application to contracts and franchises, said ordinance would not be applicable to lease agreements with tenants at the Airport, which are primarily conveyances and which establish the relationship of landlord and tenant between the parties thereto. Moreover, this interpretation is bolstered by the fact that the more extensive compliance provisions of Section 12B.2 are expressly limited to contracts for public works or for goods or services only.

Ordinance No. 261-66, as amended, whether applicable to leases or not, would not operate retroactively so as to include any agreements entered into before its enactment by its own terms. Section 12B.1 therein expressly states that it is applicable to franchises and contracts "hereafter negotiated, let or awarded."

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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December 28, 1970

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Are Ambulance Regulations of Health  
Code Applicable to Vehicles Transporting  
Ambulatory Persons to Place of  
Examination or Treatment?

Dear Doctor Curry:

An ambulance company in San Francisco is utilizing a bus-van type of vehicle to transport persons for medical examination and treatment to doctors' offices, clinics and hospitals. This vehicle has seats rather than a collapsible gurney, is not used to answer emergency calls, does not carry emergency medical equipment and does not have a red light or siren. The persons being transported are all ambulatory and are usually taken from their homes to offices, clinics or hospital for examination or treatment and, presumably, back to their homes.

Based upon the foregoing circumstances, you have asked whether such vehicles are subject to the permit and regulation provisions for ambulances in Sections 901-905 of the Health Code.

In Letter Opinion No. 67-16-A, dated February 27, 1967, I advised your department that van type vehicles used for transportation of persons, excluding emergency cases, from their homes to hospitals and clinics for medical treatment were not private ambulances within the definition of the Health Code and, therefore, did not need a permit pursuant to said code. That opinion is applicable here in view of the fact that the vehicles used and the persons transported are essentially of the same kind. Accordingly, attached hereto is a copy of my prior opinion.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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